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89-1283

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARCADIA, OHIO, *et al.*,
Petitioners,

v.

OHIO POWER COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GREGG D. OTTINGER *
DUNCAN, ALLEN AND TALMAGE
1575 Eye Street, N.W.
Suite 300
Washington, D.C. 20005
(202) 289-8400

February 9, 1990

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission is entitled to judicial deference in interpreting Section 318 of the Federal Power Act (FPA), one of the Commission's own organic statutes, even though that particular section of the Act concerns the Commission's jurisdiction.

2. Whether Section 318 of the FPA should be interpreted to oust the Federal Energy Regulatory Commission of jurisdiction over rate matters only when there is an actual conflict between a requirement imposed by that agency pursuant to the FPA and a requirement imposed by the Securities and Exchange Commission pursuant to the Public Utility Holding Company Act.

PARTIES TO THE PROCEEDING

In addition to the petitioner listed in the caption, the following Ohio municipalities were parties in the court below and are petitioners herein:

Bloomdale
Bryan
Carey
Cygnet
Deshler
Greenwich
Ohio City
Plymouth
Republic
Shiloh
St. Clairsville
Sycamore
Wapakoneta
Wharton

In addition to the respondent listed in the caption, the following parties in the court below are respondents herein:

Federal Energy Regulatory Commission
LCP Chemicals, Inc.
Mobay Corporation
Olin Corporation
PPG Industries, Inc.

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v.

OHIO POWER COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 880 F.2d 1400 (D.C. Cir. 1989). The decision of the Federal Energy Regulatory Commission (FERC) (App., *infra*, 31a-67a) is reported at 39 F.E.R.C. ¶ 61,098 (1987). The decision of the FERC denying rehearing (App., *infra*, 68a-73a) is reported at 43 F.E.R.C. ¶ 61,046 (1988).

JURISDICTION

The court of appeals rendered its judgment on July 28, 1989. Rehearing was denied on October 12, 1989. App., *infra*, 29a-30a. On January 2, 1990, the Chief

Justice extended the time for filing a petition for a writ of certiorari to and including February 9, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

Section 318 of the Federal Power Act of 1935 provides in relevant part:

> **Conflict of Jurisdiction.** If, with respect to the issue, sale, or guaranty of a security, . . . or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 . . . and to a requirement of this chapter . . ., the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this chapter . . . with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this chapter shall apply to such person.

16 U.S.C. § 825q.

STATEMENT

1. Petitioners are fifteen small Ohio villages and cities that purchase wholesale electric power from respondent Ohio Power Company for resale to their residents.[1] Ohio Power is an operating public utility subsidiary of the American Electric Power Company (AEP), which also owns seven other electric utilities operating as an interconnected system in a seven-state area.

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[1] Petitioners include the Villages of Arcadia, Bloomdale, Carey, Cygnet, Deshler, Greenwich, Ohio City, Plymouth, Republic, Shiloh, Sycamore, and Wharton, and the Cities of Bryan, St. Clairsville, and Wapakoneta. Petitioners have populations ranging from approximately 300 to 8500.

Ohio Power purchases coal for generating electricity from its wholly owned subsidiary, the Southern Ohio Coal Company (SOCCO). Coal costs are the dominant component in the total cost of producing electricity from coal-fueled generators; in this case, for example, coal costs make up nearly half of Ohio Power's revenues from sales to petitioners. See Ohio Power Co., Revised Compliance Filing, Docket No. ER82-553-004 (FERC April 24, 1989). Because AEP is a registered public utility holding company, contractual relationships among its affiliated companies are subject to regulation by the Securities and Exchange Commission (SEC) under the Public Utility Holding Company Act of 1935 (PUHCA). 15 U.S.C. § 79a(b)(2). The contract by which Ohio Power purchases coal from SOCCO is subject to certain requirements imposed by the SEC under Section 13(b) of PUHCA (15 U.S.C. § 79m(b)), but that contract was never specifically approved by the SEC.

2. In 1982, the Federal Energy Regulatory Commission (FERC) initiated a rate proceeding pursuant to Sections 205 and 206 of the Federal Power Act of 1935 (FPA). 16 U.S.C. §§ 824d & 824e. Acting under its mandate to protect ratepayers from excessive charges, FERC refused to allow Ohio Power to pass through to its customers any portion of its coal costs that did not satisfy the "comparable market test" established in FERC's Opinion No. 133 (*Public Serv. Co. of New Mexico*, 17 F.E.R.C. ¶ 61,123 (1981), *aff'd sub nom. Public Serv. Co. of New Mexico* v. *FERC*, 832 F.2d 1201 (10th Cir. 1987)). Under that test, utilities purchasing coal from affiliates may "recover no more from their ratepayers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier." 17 F.E.R.C. at 61,246. The FERC adopted the comparable market test for two reasons: First, in FERC's judgment, a "market-price limitation on fuel expense recovery from affiliated suppliers provides the best incentive for utilities to de-

velop the least costly sources of fuel." App., *infra*, 42a. Second, that limitation protects consumers from the risks of "self-dealing" and "rate manipulation" that "arise[] in transactions between affiliates." *Id.*

In this case, FERC found that, in purchasing coal from its subsidiary, Ohio Power had paid approximately 50 percent more than the market price in 1980, approximately 94 percent more than the market price in 1981, and approximately 24 to 33 percent more during the period from 1982 to 1986. App., *infra*, 58a n.87. Accordingly, FERC ordered Ohio Power to establish rates calculated to recover from its customers no more than the comparable market price of coal. App., *infra*, 60a-65a. FERC also ordered Ohio Power to refund prior overcharges of approximately $10 million to its wholesale customers, which Ohio Power has done.

During the proceedings before the FERC, Ohio Power contended that the Commission had no jurisdiction over the coal charges Ohio Power passes on to its customers. Ohio Power based that contention upon Section 318 of the FPA, which provides that "[i]f, with respect to . . . any . . . subject matter, any person is subject both to a requirement of [PUHCA] and to a requirement of [the FPA], . . . such person shall not be subject to the requirement of this chapter . . . with respect to the same subject matter." 16 U.S.C. § 825q. Ohio Power argued that it was required by Section 13(b) of PUHCA and the relevant SEC regulations to pay to SOCCO the "costs" of producing coal from SOCCO's mine, including salaries and a return on investment, even if those costs were considerably above comparable market prices. Ohio Power further argued that the SEC's regulation of the "subject matter" of coal contracts ousted FERC of any jurisdiction to regulate the magnitude of the coal charges that Ohio Power could pass on to its customers.

FERC rejected Ohio Power's interpretation of Section 318. FERC observed that the SEC's jurisdiction under PUHCA does not extend to setting rates, as the SEC itself has repeatedly acknowledged. App., *infra*, 34a-40a. Accordingly, FERC held that for purposes of Section 318 the relevant "subject matter" of SEC regulation under PUHCA was the transfer price of coal between SOCCO and Ohio Power, not the "fuel costs Ohio Power may collect from its wholesale customers." App., *infra*, 37a. According to FERC, "setting the intra-corporate price and setting rates are not the same subject matter which would bring section 318 into play." *Id.* FERC concluded that there was therefore "no conflict in the regulation by the SEC and the regulation by this Commission" and, hence, that Section 318 did not oust FERC of jurisdiction. App., *infra*, 37a-38a.[2]

3. A divided court of appeals reversed. The court did not dispute FERC's conclusion that its comparable market test is necessary to protect consumers against the risks of self-dealing and rate manipulation arising from transactions between a public utility and its affiliates. Nor did the court dispute FERC's finding that, during each year from 1981 to 1986, Ohio Power had paid its coal subsidiary between 24 percent and 94 percent more than market prices, and that Ohio Power had passed those inflated costs on to its customers. Nor did the court dispute FERC's determination that the SEC does not, in fact, regulate the fuel charges that are passed on to customers of a public utility subject to PUHCA, and that there is therefore no actual conflict between the SEC's exercise of its jurisdiction under PUHCA and FERC's exercise of jurisdiction under the FPA. Instead, the panel majority agreed with Ohio Power that Section 318 completely ousts FERC of jurisdiction to regulate the fuel charges that a utility may pass along to con-

[2] FERC also disputed Ohio Power's claim that the SEC *requires* Ohio Power to purchase coal from its subsidiary at cost, as opposed to permitting Ohio Power to purchase coal at a price no greater than cost. App., *infra*, 36a.

sumers in its rates if the SEC has any jurisdiction over the contracts by which coal is sold to the utility.

In reaching that conclusion, the majority held, as an initial matter, that FERC is not entitled to any deference in its interpretation of Section 318 of the Federal Power Act. The majority acknowledged that *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837 (1984), and other decisions of this Court require a reviewing court to defer to "'an agency's construction of the statute which it administers.'" App., *infra*, 8a (quoting *Chevron*, *supra*, 467 U.S. at 842). However, the majority held that "Section 318 cannot be said to be entrusted to FERC's administration" because that provision "involves" FERC "only to the extent of FERC's interface with regulation of the regulated entities by the SEC under PUHCA." *Id.* Therefore, according to the majority, the usual rule requiring deference to an agency's statutory interpretation does not apply in this area of jurisdictional ambiguity.

Interpreting the statute *de novo*, the court agreed with Ohio Power's interpretation of the phrase "subject matter" in Section 318. Noting that the SEC has jurisdiction over "the price term of sales contracts between associated companies," the majority argued that "FERC has in effect set by order a different price term for such a contract by determining that it will not allow the contract price as a cost in [Ohio Power's] rate case." App., *infra*, 9a. Thus, the majority found that "the same subject matter is implicated" by the regulations of the SEC and the FERC. App., *infra*, 9a-10a. The majority concluded that Section 318 gives the SEC exclusive jurisdiction over the costs incurred by Ohio Power under contracts with its subsidiaries, even though those costs are passed through to wholesale customers in rates that otherwise would be subject to the exclusive authority of FERC. App., *infra*, 9a-10a, 17a. The court relied for this conclusion upon an analogy to this Court's "preemption of the field" decision in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 970-71 (1986), which held that

FERC's determinations of any issues underlying FERC-set wholesale rates preempt state determinations concerning similar issues in determining retail rates. Because the SEC, in the majority's view, has exclusive jurisdiction over all costs arising from a contract between a PUHCA-regulated utility and its affiliate, the court held that FERC is ousted of jurisdiction even if there is no actual conflict between SEC regulation and FERC regulation. App., *infra*, 14a-16a.

Judge Mikva dissented from this part of the majority's opinion. He argued that Section 318 does not grant the SEC exclusive jurisdiction over all costs arising from a PUHCA-regulated contract. Instead, it grants the SEC paramount authority in the event there is an actual regulatory "conflict" between a SEC requirement and an action taken by FERC. App., *infra*, 19a-20a. In this case, Judge Mikva argued, the contract costs were approved as ceilings by the SEC, but FERC's decision to allow only a part of those costs to be passed on to consumers merely had the effect of lowering those costs below the specified ceilings. App., *infra*, 21a-23a. Thus, Ohio Power could comply with both requirements and simultaneously promote the purposes of both statutes. Therefore, Judge Mikva concluded, there was no conflict in the requirements imposed upon Ohio Power that would warrant ousting FERC's jurisdiction under Section 318. App., *infra*, 23a.[3]

[3] Judge Mikva ultimately concurred in the decision to set aside FERC's order on the ground that, in his view, Rule 35.14(a)(7) of FERC's own rules precludes FERC from disallowing any costs approved by the SEC. Rule 35.14(a)(7) provides that such costs "shall be deemed to be reasonable" for ratemaking purposes. 18 C.F.R. § 35.14(a)(7). In its own decision in this case, the FERC had held that this language merely "creates a *presumption* of reasonableness, not a conclusive finding of reasonableness." App., *infra*, 41a (emphasis added). Judge Mikva, however, disagreed with FERC's interpretation of its regulation, and held that the regulation's language creates a conclusive presumption. App., *infra*, 24a. The majority did not reach, or even comment upon, this issue.

The court of appeals denied rehearing on October 13, 1989. App., *infra*, 29a. Judge Mikva issued a statement urging rehearing because "the panel opinion creates a regulatory gap that can be mischievous in future cases" in "this important and delicate area of inter-agency administration of the law." App., *infra*, 30a. As Judge Mikva explained, "The statutory interpretation engaged in by the majority . . . generates a no-man's land where neither the [SEC] nor FERC will patrol holding company practices which can oppress consumers, investors and the public." *Id.* According to Judge Mikva, "Congress did not intend and our court should not construct such a result." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents two distinct but equally important questions of federal law that have widespread significance not only for federal electric utility regulation, but also for the relationship between federal agencies and reviewing courts. The first, which is a threshold issue in any case of this kind, is whether the deference principles articulated in *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837 (1984), and other decisions of this Court apply to an agency's interpretation of a statute that defines or limits the reach of that agency's jurisdiction. The court below held that those principles do not apply in that circumstance, and in so doing placed itself in conflict with decisions of other courts of appeals, specifically the decision of the First Circuit in *Kokajko* v. *FERC*, 873 F.2d 419, 422-23 (1st Cir. 1989), that of the Third Circuit in *Puerto Rico Maritime Shipping Auth.* v. *Valley Freight Sys.*, 856 F.2d 546, 550-52 (3d Cir. 1988), and that of the Ninth Circuit in *Wyckoff Co.* v. *EPA*, 796 F.2d 1197, 1199-1201 (9th Cir. 1986).

The second issue is whether Section 318 of the FPA ousts FERC of jurisdiction over a wholesale electric

rate matter even though no actual conflict exists between a requirement imposed by that agency pursuant to the FPA and any requirement imposed by the SEC pursuant to PUHCA. The majority held that it does, and in so doing placed itself in conflict with the Fourth Circuit's decision in *Appalachian Power Co.* v. *FPC*, 328 F.2d 237 (4th Cir.), *cert. denied*, 379 U.S. 829 (1964).

The majority's interpretation of Section 318 also creates a substantial "regulatory gap" (to borrow Judge Mikva's phrase) that will permit—indeed encourage—electric utilities to gouge their customers by manipulating the prices utilities pay for goods and services provided by affiliates. As a result, the decision below will have a dramatic impact on electric rates paid by nearly 50 million consumers located in most parts of the country.

1. This Court has repeatedly held that, unless Congress has directly spoken to the precise question at issue, a reviewing court must defer to any reasonable construction of a statute by the agency charged with its administration. See, *e.g.*, *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837, 842-44 (1984); *K Mart Corp.* v. *Cartier, Inc.*, 108 S.Ct. 1811 (1988). As noted above (*supra* p. 6), the majority declined to give any deference to FERC's interpretation of Section 318 of the Federal Power Act, holding that "Section 318 cannot be said to be entrusted to FERC's administration" because that provision deals only with "the extent of FERC's interface with regulation of the regulated entities by the SEC under PUHCA." App., *infra*, 8a.

FERC, as the successor to the Federal Power Commission, is the only agency responsible for administering the Federal Power Act as a whole, and Section 318 is part of the FPA. See Pub. L. No. 74-333, 49 Stat. 838, 839, 863 (codified as amended at 16 U.S.C. § 791 *et seq.*).[4] Accordingly, the court of appeals' holding neces-

[4] The majority's statement that "Section 318 [of the FPA] cannot be said to be entrusted to FERC's administration" (App., *infra*,

sarily rests upon that court's view that Section 318 itself concerns only "the extent of FERC's interface with"—*i.e.*, jurisdiction over—entities that are also regulated by the SEC under PUHCA. In short, the court below held that FERC's interpretation of Section 318 is not entitled to any deference because that provision concerns the extent of FERC's jurisdiction rather than the nature of FERC's regulatory responsibilities.

a. The amount of deference, if any, owed by a reviewing court to an agency's interpretation of a jurisdictional provision in its organic statute is an issue on which the courts of appeals disagree. The decision below follows the law laid down in other decisions of the D.C. Circuit. In *New York Shipping Ass'n* v. *FMC*, 854 F.2d 1338 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 866 (1989), for example, the court refused to defer to the Federal Maritime Commission's interpretation of Section 5 of the Maritime Labor Agreements Act of 1980 (46 U.S.C. § 841c). See *id.* at 1362-63. Relying upon a distinction drawn in prior D.C. Circuit decisions between statutes

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8a) cannot be interpreted to mean that Section 318 is not part of FERC's organic statute, as was the case in the decision cited by the majority. *See Department of Treasury* v. *FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988) (declining to give deference to FLRA's interpretation of statutes and regulations administered by Office of Personnel Management). Indeed, the majority opinion repeatedly and correctly recognized that Section 318 is part of the Federal Power Act. *See, e.g.*, App., *infra*, 2a, 4a-5a. (The Federal Power Act, in turn, was originally enacted as Title II of the Public Utilities Act of 1935, of which the Public Utility Holding Company Act was Title I. *See* 49 Stat. 803, 838.) In stating that the FERC does not "administer" Section 318, the majority plainly meant that, unlike nonjurisdictional provisions of the Act, Section 318 contains no substantive regulatory standards which FERC applies. *See, e.g.*, *ACLU* v. *FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (drawing distinction, for *Chevron* purposes, between jurisdictional provisions and "provisions pertaining to the mechanics or inner workings of the regulatory process").

dealing with the substance of an agency's regulatory responsibilities and those dealing with the agency's jurisdiction (*id.* at 1363 n.9), the court held that "it would . . . be inappropriate for us to defer to the agency where, as here, it is interpreting not the meaning of a statute that Congress has charged it to administer, but rather a statute merely delimiting its jurisdiction as against that" of other regulatory agencies (*id.* at 1363 (alternative holding)). At least one other court of appeals—the Eighth Circuit—has joined the D.C. Circuit in squarely holding that an agency is "not entitled to judicial deference" when it construes a provision dealing with the "scope of [its] statutory authority." *Missouri* v. *Andrews*, 787 F.2d 270, 286-87 (8th Cir. 1986), *aff'd on other grounds sub nom. ETSI Pipeline Project* v. *Missouri*, 108 S.Ct. 805 (1988) (refusing to defer to interpretation by Secretary of Interior of Section 9(c) of Flood Control Act).

On the other hand, the First, Third, and Ninth Circuits have held that *Chevron*-style deference *is* required in reviewing an agency's interpretation of its authority under its organic statute. In *Puerto Rico Maritime Shipping Auth.* v. *Valley Freight Sys.*, 856 F.2d 546 (3d Cir. 1988), for example, the Third Circuit upheld as reasonable an interpretation by the ICC of the statutory provision giving the ICC jurisdiction over motor carriers (49 U.S.C. § 10521), even though it noted that, "[w]ere the question being considered as an original matter, one might reasonably prefer" the opposing party's interpretation. 856 F.2d at 551-52. Citing *Chevron*, the court held that the "rule of deference is fully applicable to an agency's interpretation of its own jurisdiction." *Id.* at 552. The Ninth Circuit reached the same conclusion in deferring to the EPA's interpretation of Section 3006 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6926), which concerns the allocation of responsibility between federal and state authorities in administering that Act. *Wyckoff Co.* v. *EPA*, 796 F.2d

1197, 1200-01 (9th Cir. 1986). Similarly, in *Kokajko* v. *FERC*, 873 F.2d 419, 422-23 (1st Cir. 1989), the First Circuit held that FERC's interpretation of its jurisdiction under Section 10(a) of the Federal Power Act over fees charged by regulated hydroelectric power plants for access to associated recreational property was entitled to *Chevron*-style deference. The decision below, holding that deference is not warranted because Section 318 concerns the limit of FERC's authority, squarely conflicts with each of these decisions.

Aside from this conflict in the circuits, the question whether an agency is entitled to deference when interpreting a statute defining or delimiting its jurisdiction is of substantial importance in administrative law. The significance of that question is well illustrated by the sharply divergent views expressed in the concurring and dissenting opinions in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 108 S.Ct. 2428 (1988). See *id.* at 2443-44 (Scalia, J., concurring in the judgment); *id.* at 2446-47 (Brennan, J., dissenting). As the concurring opinion correctly observed, a large percentage of disputes over the proper construction of administrative statutes are, at bottom, disputes over the agency's jurisdiction or authority. See *id.* at 2444 (Scalia, J., concurring in the judgment).

b. The majority's refusal to defer to FERC was critical to the decision in this case because the majority plainly could not have reached the result it did if it had accorded any deference at all to FERC's interpretation of Section 318. As previously discussed (*supra* p. 4), whether FERC has any jurisdiction under Section 318 over fuel charges arising from coal contracts with an affiliated coal subsidiary depends upon whether FERC is attempting to regulate the same "subject matter" regulated by the SEC. But merely reading the phrase "subject matter" cannot resolve that question: Only if the phrase is interpreted broadly, as Ohio Power proposed, are "coal costs" the relevant subject matter in this case. "Subject

matter," however, also lends itself to a narrower interpretation, under which the coal price charged to Ohio Power by its affiliate is one "subject matter," and the coal-related fuel charges passed through to Ohio Power's customers are a separate "subject matter." See *supra* p. 5.

Recognizing the inherent ambiguity in the statutory phrase, FERC reasonably could consider the title of Section 318, *i.e.*, "*Conflict* of Jurisdiction," as well as other indications of congressional purpose, all of which show that Congress intended to limit the reach of Section 318 to irreconcilable conflicts between a requirement imposed under PUHCA and a requirement imposed by FERC under the FPA. See 16 U.S.C. § 825q; 49 Stat. 803, 863; see also H.R. Rep. No. 1903, 74th Cong., 1st Sess. 75 (1935) (Section 318 covers "any conflict arising under this bill"). On that basis, FERC determined that the statute should be construed to produce overlapping "subject matters" only when the regulatory requirements of the SEC and FERC are in actual conflict. It therefore adopted a narrower interpretation of "subject matter" than that advanced in Ohio Power. See *supra* p. 5. FERC also recognized that, because "[t]he SEC's jurisdiction . . . does not extend to setting rates and determining what fuel costs" an electric utility may collect from its customers (App., *infra*, 37a), Ohio Power's broad interpretation would produce a regulatory gap not contemplated by Congress. Accordingly, FERC interpreted the statute to prevent an outcome that Congress almost certainly would condemn.

On its face, FERC's interpretation is the only sensible reading of Section 318. At a minimum, FERC's interpretation is a reasonable construction of the statutory language and, for that reason, plainly would have been upheld if the court below had granted FERC any deference.

This case thus provides an appropriate and compelling vehicle through which to resolve the question whether a reviewing court must defer to an agency's reasonable construction of a portion of the agency's organic statute defining or delimiting the agency's jurisdiction.[5] To be sure, the jurisdiction problem in this case concerns not only the scope of FERC's authority, but also the SEC's authority. But any consideration of this case on the merits would have to begin with the threshold issue of whether a reviewing court owes deference to an agency's interpretation of any jurisdictional statute. Thus, that issue is squarely posed here.[6] Accordingly, the Court should grant certiorari to resolve the circuit conflict over this important question of administrative law.

2. The majority's interpretation of Section 318 also warrants this Court's attention, quite aside from the court of appeals' refusal to accord any deference to FERC's interpretation. As noted earlier (*supra* p. 6), the majority held that, because Ohio Power's coal costs were subject to regulation by the SEC, FERC was ousted from jurisdiction, even though the SEC was merely regulating the price Ohio Power paid to its affiliate, and even though there is no actual conflict between the two

[5] The court of appeals' observation (App., *infra*, 8a) that FERC did not claim any deference for its interpretation in that court is irrelevant. FERC did not disavow deference. Moreover, the issue is clearly appropriate for resolution now because the court of appeals addressed and squarely decided the issue.

[6] Indeed, both the Eighth Circuit's decision in *Missouri* v. *Andrews*, *supra*, and the D.C. Circuit's decision in *New York Shipping Ass'n*, *supra*, also involved statutes that allocated jurisdiction between two agencies. *See* 787 F.2d at 281-86 (statute allocating authority between Army and Interior departments); 854 F.2d at 1363 (statute allocating jurisdiction between NLRB and FMC). But, like the majority's decision below, those decisions determined that no deference was appropriate based upon the broad principle that an agency's interpretation of its own jurisdiction is not entitled to *Chevron*-style deference. *See supra* pp. 10-11.

agencies' requirements. See *supra* p. 5. In essence, then, the court of appeals applied a "preemption of the field"-type analysis rather than a "conflict preemption"-type analysis in determining how regulatory authority should be allocated between two federal agencies. Compare, *e.g.*, *Nantahala*, *supra*, 476 U.S. at 962-67 (field preemption analysis under "filed rate" doctrine) and *Schneidewind* v. *ANR Pipeline Co.*, 108 S.Ct. 1145, 1151-56 (1988) (field preemption analysis), with *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 109 S.Ct. 1262, 1267-78 (1989) (conflict preemption analysis).[7]

This interpretation of Section 318 conflicts with the decision of the Fourth Circuit in *Appalachian Power Co.* v. *FPC*, 328 F.2d 237, 249-52 (4th Cir.), *cert. denied*, 379 U.S. 829 (1964), which involved one of Ohio Power's sister companies in the AEP system. Relying upon this Court's decision in *Northwestern Elec. Co.* v. *FPC*, 321 U.S. 119, 125 (1944), the Fourth Circuit held that "[u]nder section 318 of the Federal Power Act *actual conflicts* between the FPC and the SEC are resolved in favor of the SEC." 328 F.2d at 250 (emphasis added). Applying this interpretation of Section 318, the court upheld certain accounting regulations issued by FERC's predecessor on the ground that those regulations did not conflict with accounting regulations issued by the SEC under PUHCA, even though both sets of regulations covered the same general subject area. *Id.* at 250-52.

In addition to its inconsistency with *Appalachian Power*, the majority's "preemption of the field" approach is incorrect for at least three reasons. *First*, as discussed above (*supra* p. 13), that approach is at odds with the language and structure of Section 318 itself. *Second*, the rationale underlying the "preemption of the field" ap-

[7] The majority's reliance upon this Court's decision in *Nantahala*, *supra*, for this holding is particularly ironic, inasmuch as the underlying principle of that decision is deference to FERC in ratemaking matters. *See* 476 U.S. at 962-67.

proach is inapplicable here. Acts of Congress dealing with interstate commerce can remain "supreme and exclusive" if state laws are preempted not only when they actually conflict with federal law, but also when they may "interfere with federal authority over the same activity." *Nantahala Power & Light Co.* v. *Thornburg*, *supra*, 476 U.S. at 964 (quoting *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 318-19 (1981)). That rationale does not apply to potential overlaps in the jurisdictions of two or more federal agencies, because federal authority remains supreme regardless of which agency actually regulates the particular matter at issue. *Third*, as Judge Mikva recognized, the majority's approach creates an obvious "gap" in the federal regulatory system whenever the agency retaining jurisdiction has in fact failed to occupy the entire field. See App., *infra*, 30a.[8]

[8] Judge Mikva's decision to concur in the result on the basis of Section 35.14(a)(7) of FERC's own rules does not undermine the importance of the majority's interpretation of Section 318. Although he recognized the principle that a reviewing court should defer to an agency's interpretation of its own rules (*see* App., *infra*, 24a), Judge Mikva failed to heed that principle in concluding, contrary to FERC's long-standing interpretation, that the word "deemed" in Section 35.14(a)(7) *necessarily* establishes a conclusive presumption that any charges approved by the SEC are reasonable. *See supra* n.3; *cf. McDowell County Consumers Council* v. *American Elec. Power Co.*, 54 F.P.C. 361 (1975) (§ 35.14 does not establish conclusive presumption); 15 F.E.R.C. ¶ 61,257 at 61,592-93 (1981) (same). The word "deemed" is frequently used to connote merely a rebuttable presumption. *E.g., Lavine* v. *Milne*, 424 U.S. 577, 583 (1976); *Gaither* v. *Myers*, 404 F.2d 216, 218 (D.C. Cir. 1968); *Hardy* v. *Lomenzo*, 349 F. Supp. 617, 621 (S.D.N.Y. 1972). FERC's interpretation, therefore, is not at odds with the plain meaning of its own regulation, and is therefore entitled to deference under well-settled principles. *See, e.g., Jewett* v. *Comm'r*, 455 U.S. 305, 318 (1982); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Western Union Telegraph Co.* v. *FCC*, 815 F.2d 1495, 1503 (D.C. Cir. 1987).

But, even if Judge Mikva were correct, his approach would have left FERC free to regulate the ratemaking consequences of

The decision below also warrants this Court's attention because it creates a substantial risk that future decisions of the D.C. Circuit and of other federal courts will apply the majority's erroneous "preemption of the field" approach in cases involving the allocation of jurisdiction between federal agencies, thereby creating gaps in other federal regulatory schemes. Review by this Court is necessary to prevent that result, and to resolve the conflict between the decision below and the Fourth Circuit's decision in *Appalachian Power*.

3. Aside from the doctrinal importance of the issues decided by the majority, the decision below will have a dramatic impact on electric utility rates paid by the direct and indirect customers of every electric utility company subject to PUHCA. Those companies serve, directly or indirectly, approximately 49 million households and businesses in 30 states and the District of Columbia. See Federal Energy Regulatory Commission, FERC Form 1, Annual Reports of Major Electric Utilities, Licensees and Others (1988); Electrical World, Directory of Electric Utilities (98th ed. 1990). Those companies account for approximately 16 percent of revenues generated by all electric utilities. See Securities and Exchange Commission, Financial and Corporate Report on Holding Companies Registered Under the Public Utility Holding Company Act of 1935 (Dec. 31, 1988) ("SEC Report") (PUHCA-regulated utilities account for 20.2 percent of all revenues by investor-owned utilities); Energy Information Administration, Annual Outlook For United States Electric Power 1989 at 37 (investor-owned utilities account for approximately 80 percent of total elec-

transactions between electric utilities and their affiliates prospectively. FERC could simply rescind or modify its regulation, and would then be free under Section 318 to exercise regulatory oversight over efforts by PUHCA-regulated electric utilities to pass unreasonable costs on to their customers. Under the majority's approach, by contrast, FERC is helpless to protect ratepayers.

tricity generation). Together, electric utilities subject to PUHCA have assets in excess of $80 billion, and annual revenues (as of 1988) in excess of $27 billion. SEC Report at 2. In addition to numerous coal subsidiaries, these companies also have nuclear fuel subsidiaries, fuel oil subsidiaries, real estate subsidiaries, communications subsidiaries, leasing subsidiaries, credit subsidiaries, legal and accounting subsidiaries, engineering subsidiaries, construction subsidiaries, electric generation subsidiaries and assorted other subsidiary service companies. See *id.* at 12-65.

The decision below held that the mere existence of SEC jurisdiction over a particular transaction between an electric utility subject to PUHCA and any affiliated company completely insulates all aspects of that transaction from future ratemaking review by FERC, no matter what effect the transaction has on the electric rates subject to review by FERC. Inasmuch as any challenge to a FERC rate order can be brought in the D.C. Circuit (see FPA § 313(b), 16 U.S.C. § 825*l*(b)), the court of appeals' decision will effectively eliminate FERC jurisdiction over the rate consequences of all such transactions. The decision below thus makes it impossible for FERC to protect nearly 50 million ratepayers against potential self-dealing, unnecessary "gold plating" of plant and equipment, and rate manipulation arising from transactions between electric utilities and their affiliates. The decision below, moreover, creates a strong incentive for electric utilities to adopt the holding company form, and for new and existing holding companies to create new subsidiaries to provide every conceivable good and service needed for the generation, transmission and distribution of electricity. The decision, therefore, could lead to a major restructuring of the entire industry, contrary to Congress's goal, articulated in PUHCA itself, of discouraging public utility holding companies and the abuses that attend them. See 15 U.S.C. § 79a(b)(2).

The SEC, moreover, lacks both the statutory authority and administrative apparatus necessary to protect ratepayers against these harmful consequences. The SEC, unlike FERC, has no statutory or administrative procedures by which a customer can initiate a complaint. Cf. FPA § 206; 16 U.S.C. § 824e. And the SEC, unlike FERC, has no clear statutory authority to order refunds for overcharges if a utility is found to have violated the SEC's regulatory requirements. Cf. FPA § 205(e), 16 U.S.C. § 824d. Indeed, the SEC has repeatedly recognized that it has "no power over the[] dealings [of electric utilities regulated under PUHCA] with their customers, retail or wholesale." *American Elec. Power Co.*, 46 S.E.C. 1299, 1323 (1978); accord *Louisiana Power & Light Co.*, 26 S.E.C. Docket 1257, 1263 (1982); *New England Elec. Sys.*, 24 S.E.C. Docket 229, 235 (1981); *Arkansas Power & Light Co.*, 45 S.E.C. 567, 574 (1974); *Vermont Yankee Nuclear Power Corp.*, 43 S.E.C. 693, 699 (1968). The decision below, therefore, creates a serious gap in the regulation of electric utilities subject to PUHCA, a gap that could not be filled by the SEC even if it wanted to.

This case well illustrates the effects of this regulatory gap on consumers. As previously noted (*supra* p. 4), FERC found that the prices Ohio Power paid its subsidiary for coal exceeded market prices by 24 percent to 94 percent from 1981 to 1986, and it required Ohio Power to make corresponding reductions in its wholesale rates. Inasmuch as coal costs represent approximately half the costs of generating electricity from coal-fired generators (*supra* p. 3), the rates paid by petitioners (and, therefore, their residents) between 1981 and 1986 were 12 to 47 percent higher than they would have been if the coal cost component of those rates had been limited to market prices. Thus, the decision below not only will require petitioners (and their residents) to repay to Ohio Power the substantial overcharges that FERC ordered refunded to petitioners, but also, in all likelihood, will lead to sub-

stantial increases in the rates petitioners must now pay for electricity. All of the nearly 50 million households and businesses that receive electricity directly or indirectly from electric utilities subject to PUHCA can reasonably expect similar increases as a result of the decision below, increases they would not face if their electric utilities were not subject to PUHCA.

In short, the panel's decision creates a "no-man's land" in an "important and delicate area of inter-agency administration of the law." App., *infra*, 30a (Mikva, J.). Far from creating a mere academic curiosity, the decision below will produce a substantial and inequitable hardship for millions of electric utility ratepayers in most parts of the country. Only review by this Court can avert the doctrinal and economic mischief created by the court of appeals' decision.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

GREGG D. OTTINGER *
DUNCAN, ALLEN AND TALMAGE
1575 Eye Street, N.W.
Suite 300
Washington, D.C. 20005
(202) 289-8400

February 9, 1990

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

LCP CHEMICALS & PLASTICS, INC., *et al.*,
MUNICIPAL WHOLESALE ELECTRIC CUSTOMERS OF
OHIO POWER COMPANY,
Intervenors.

Argued Feb. 24, 1989

Decided July 28, 1989

Petition for Review of an Order of the
Federal Energy Regulatory Commission

Edward Berlin, with whom Andrew L. Lipps, Kenneth G. Jaffe, Washington, D.C., and Edward J. Brady, were on the brief, for petitioner.

Joanne Leveque, Attorney, F.E.R.C., with whom Catherine C. Cook, Gen. Counsel, and Joseph S. Davies, Deputy Sol., F.E.R.C., Washington, D.C., were on the brief, for respondent.

John Estes also entered an appearance for respondent.

Gregg D. Ottinger, Washington, D.C., and T.D. Kauffelt, Charleston, W. Va., were on the brief, for intervenors, Municipal Wholesale Electric Customer of Ohio Power Company and Industrial intervenors.

Before MIKVA, SILBERMAN, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

Concurring opinion filed by Circuit Judge MIKVA.

SENTELLE, Circuit Judge:

The Federal Energy Regulatory Commission (FERC) determined in a rate proceeding that Ohio Power Company's cost of coal purchased from an associated company was unreasonably high. The company has petitioned us to vacate the order on the grounds that it is for the Securities and Exchange Commission (SEC) to determine the reasonableness of contracts between associated companies. We grant the petition for the reasons set out below.

I. Background

A. *The Statute*

The central issue raised by petitioner concerns the applied meaning of the phrase "subject matter" in section 318 of the Federal Power Act (FPA), 16 U.S.C. § 825q, an issue to which section 13(b) of the Public Utility Holding Company Act of 1935 (PUHCA), 15 U.S.C. § 79m(b), is relevant. FPA § 318 and PUHCA § 13 were enacted in different titles of the Public Utility Act of 1935, ch. 687, 49 Stat. 803 (1935) (codified as amended principally at 15 U.S.C. §§ 79 to 79z-6 and 16 U.S.C.

§§ 824-825r (1982 & Supp. V. 1987)), which initiated federal regulation of public utility holding companies theretofore insulated from effective state-level regulation by their multi-state operations. The broadly remedial purposes of the Public Utility Act included protection of investors, consumers, and the public from various abusive holding company practices, including non-arm's-length contracts within an associated group. *See* 15 U.S.C. § 79a(b)(2). (The definitions of public utility holding company, associate company, and similar terms are set out in section 2 of PUHCA, 15 U.S.C. § 79b. Those definitions are applicable to the present case but not in dispute.)

More particularly for our purposes, PUHCA § 13(b) makes unlawful contracts between associates of a public utility holding company,

> except in accordance with such terms and conditions and subject to such limitations and prohibitions as the [SEC] . . . shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies.

15 U.S.C. § 79m(b).[1] The SEC's Rule 90 prohibits associated companies from making or performing contracts

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[1] The full text of section 13(b) is as follows:

> After April 1, 1936, it shall be unlawful for any subsidiary company of any re[illegible]ed holding company or for any mutual service company, b[illegible]e of the mails or any means of instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions

for sale of goods or performance of services "at more than cost." 17 C.F.R. § 250.90(a)(2)(1988). Under the SEC's Rule 91, a transaction is deemed to meet that standard when the price "does not exceed a fair and equitable allocation of expenses . . . plus reasonable compensation for necessary capital procured through the issuance of capital stock. . . ." 17 C.F.R. § 250.91(a). The sale between associates of seller-produced goods is not "limited to cost," 17 C.F.R. § 250.90(d)(2), but such a seller still may not charge its associate more than a fair market price. 17 C.F.R. § 250.92(b).

Under the concurrently enacted provisions of the FPA, FERC regulates the justness and reasonableness of wholesale rates for electric power in interstate commerce. 16 U.S.C. §§ 824, 824d, 824e.[2] FERC's authority includes the power to determine that a "contract affect-[ing]" such a rate is "unjust, unreasonable, unduly discriminatory or preferential" and to prescribe a just and reasonable contract. 16 U.S.C. § 824e(a). Section 318

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as the [SEC] by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies. This provision shall not apply to such transactions as the [SEC] by rules and regulations or order may conditionally or unconditionally exempt as being necessary or appropriate in the public interest or for the protection of investors or consumers, if such transactions (1) are with any associate company which does not derive, directly or indirectly, any material part of its income from sources within the United States and which is not a public utility company operating within the United States, or (2) involve special or unusual circumstances or are not in the ordinary course of business.

15 U.S.C. § 79m(b).

[2] This power originally resided in the Federal Power Commission, of which FERC is the successor agency. 42 U.S.C. §§ 7172(a)(1)(B) & 7293 (1982).

of the FPA provides that, in the absence of an SEC-granted exemption, the requirements of PUHCA govern when a company is subject both to a requirement of the SEC-administered PUHCA (including rules, regulations, and orders thereunder) "with respect to [an itemized list not at issue here] *or any other subject matter*" and of the FERC-administered FPA (including rules, regulations, and orders thereunder) "with respect to *the same subject matter*." 16 U.S.C. § 825q (emphasis added).

B. *OPCO, SOCCO, and the SEC*

Petitioner Ohio Power Company (OPCO) is an operating public utility subsidiary of American Electric Power Company, Inc. (AEP), a public utility holding company subject to PUHCA. OPCO purchases coal from its wholly-owned subsidiary Southern Ohio Coal Company (SOCCO) on esentially a cost-pass-through basis. Because both are associates of a public utility holding company, it is unquestioned that the coal-sale transactions between OPCO and SOCCO are subject to SEC jurisdiction under section 13(b).

The SEC has issued four orders that touch on the price of the OPCO-SOCCO coal transactions. *Ohio Power Company*, Holding Co. Act Release No. 17,383 (Dec. 2, 1971), permitted OPCO to inject capital into the corporate shell of SOCCO so SOCCO could develop OPCO-owned coal reserves "to assure a reliable supply of coal." *Id.* The SEC noted that, under the proposal before it, SOCCO's charges to OPCO would be "based on" its actual costs plus a rate of return on capital no greater than that approved for OPCO by the Federal Power Commission, FERC's statutory predecessor. *Id.* at 2. There were no hearings and no findings, other than the ultimate finding that the proposed transaction was in the interest of the public, investors, and consumers. The order concluded with a "proviso that nothing in this order shall be construed as in any manner affecting the

jurisdiction of any other regulatory authority with respect to the accounting or similar matter in connection with the proposed transactions." *Id. Ohio Power Company*, Holding Co. Act Release No. 20,515, 14 S.E.C. Docket 928 (Apr. 24, 1978), approved OPCO's sale of its coal mines and leases to SOCCO and its further capital contribution to SOCCO. Again, the SEC stated that "[t]he price at which SOhio [SOCCO] coal is sold to AEP system companies will not exceed the cost thereof to the seller." *Id.* at 929.

The SEC required both OPCO and SOCCO to file quarterly financial statements and statements setting out "the quantities of coal sold to each buyer, the price of such coal and the method used to compute the cost of coal sold." *Id.* at 930. *Southern Ohio Coal Co.*, Holding Co. Act Release No. 21,008, 17 S.E.C. Docket 310 (Apr. 17, 1979), approved borrowings by SOCCO intended to reduce the cost of coal by providing cheaper capital. *Southern Ohio Coal Co.*, Holding Co. Act Release No. 21,537, 19 S.E.C. Docket 1309 (Apr. 25, 1980), approved additional OPCO investment in SOCCO to finance capital improvements expected to reduce the cost of coal to SOCCO's buyers. As in the previous decisions, the last order adverted briefly to the contractual relation between the associates: "The price at which [SOCCO's] coal will be sold to AEP system companies will not exceed the cost thereof to the seller. For this purpose, cost will include reasonable compensation for necessary capital." *Id.* The SEC cited sections 6, 7, 9, 10, and 12 of PUHCA, 15 U.S.C. §§ 79f, 79g, 79i, 79j, 79*l*, as authority for its various orders. None of the orders cite section 13(b) as authority.

C. *The Decision Below*

The present dispute arose in a rate proceeding initiated in 1982. All issues settled except the extent to which OPCO could include its costs for "captive coal"

purchased from SOCCO in its recoverable cost of service. *Ohio Power Co.*, 39 F.E.R.C. ¶ 61,098, at 61,274 (1987). The Administrative Law Judge (ALJ) determined that section 318 and FERC's own regulations did not bar FERC's examination of the reasonableness of OPCO's captive coal purchases and that OPCO's coal costs had not been shown to be unreasonable. *Id.* at 61,275. The full Commission affirmed the ALJ's determination that the reasonableness of OPCO's captive coal costs were subject to review but determined that the price of the captive coal unreasonably exceeded a comparable market price. *Id.*

On the threshold section 318 issue, the ALJ had reasoned that the SEC's regulation of the "intra-corporate price of [captive] coal" was not the "same subject matter," in the section 318 sense, as FERC's regulation of utility rates. *Id.* at 61,276. FERC agreed for two reasons. First, FERC questioned whether the SEC had set the price of captive coal at cost, since it was "not clear" that the SEC statements regarding whether the price would be "based on" and "not exceed" cost had mandated a cost floor as well as ceiling. *Id.* FERC also cited the SEC's Rule 92, 17 C.F.R. § 250.92, prohibition of inter-associate sales of goods "at a price which exceeds the price at which the purchasers might reasonably be expected to obtain comparable goods elsewhere," which FERC interpreted as indicating that the SEC might require a below-cost market price, *id.*, and SEC authority for above-cost market prices, *id.* at 61,290 n. 17. FERC indicated that OPCO might apply this authority to the SEC for a market-based section 13 price.

Second, FERC reasoned that setting the inter-associate price, assuming the SEC had in fact done that, simply was not "the same subject matter," in the section 318 sense, as setting wholesale utility rates and determining what costs may be recovered therein. *Id.* at 61,276-77. FERC cited in support SEC staff disclaimers that SEC

section 13(b) orders set rates and an SEC section 13(b) exemption decision that purportedly recognized FERC's rate-making power to allow utilities within its jurisdiction to recover either SEC-authorized costs "or some other amount." *Id.* at 61,277 (quoting *New England Electric System*, Holding Co. Act Release No. 22,309, 24 S.E.C. Docket 298, 307-08 (Dec. 9, 1981)).

The SEC has not appeared in this cause.

II. Analysis

A. *Statutory Interpretation*

Before undertaking our analysis of FERC's interpretation of section 318, we note that FERC does not claim for its interpretation the deference to administrative agencies mandated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), nor is such deference warranted. While *Chevron* requires us to defer to "an agency's construction of the statute which it administers," *id.* at 842, 104 S.Ct. at 2781, "when an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is entitled to no deference." *Department of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988). Section 318 cannot be said to be entrusted to FERC's administration. Certainly it involves FERC, but only to the extent of FERC's interface with regulation of the regulated entities by the SEC under PUHCA. Therefore, FERC has rightly claimed no deference for its interpretation, and we afford none.

FERC's statutory interpretation rested on two rationales: (1) that there is no conflict between the approaches of the SEC and FERC and (2) that the same subject matter is not involved. We discuss these in the order of their acknowledged importance.

1. The Subject Matter Involved

FERC primarily relied on its determination that its decision and the SEC's decisions do not deal with "the same subject matter" because FERC is regulating rates whereas the SEC is regulating inter-associate transactions. Section 318 governs conflicts regarding "the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." 16 U.S.C. § 825q. FERC suggests in this Court that the present subject is somehow not a subject within the contemplation of section 318 because Congress enumerated certain matters in section 318 with respect to which the SEC has jurisdiction under PUHCA, *see* 15 U.S.C. §§ 79f-79g, 79i-79j, 79n-79o, but did not mention the non-enumerated subject under discussion.

We cannot accept this suggestion. Congress concluded its enumeration in section 318 with the phrase "or any other subject matter," and the inclusiveness of these words cannot be avoided, as FERC would have us do, by speculating that "Congress simply wanted to include a provision that would cover some unanticipated 'conflict' that might arise." Brief for Respondent at 21 n. 21. The price term of sales contracts between associated companies are subject to SEC jurisdiction under PUHCA, just as are the enumerated subjects, and are therefore a "subject matter" under section 318 if such price term is also subject to the requirements of the FPA or of FERC's rules, regulations or orders thereunder. 16 U.S.C. § 825q. FERC has in effect set by order a different price term for such a contract by determining that it will not allow the contract price as a cost in OPCO's rate case. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 971, 106 S.Ct. 2349, 2359, 90 L.Ed.2d 943 (1986). The conclusion that the same subject matter

is implicated is inescapable. Nor can we subscribe to FERC's analysis that the same subject matter is not involved because it sets rates and the SEC does not. Simply put, FERC's reasoning proves too much because under such an analysis there could never be a conflict between the SEC and FERC with respect to a matter not specifically enumerated in section 318. The absence of conflict would not be *malum in se*, of course, but we presume Congress contemplated that in fact it had conferred on the SEC jurisdiction over some non-enumerated matters that otherwise would fall within the jurisdiction of FERC, and it therefore included the residuary phrase in section 318 to govern those conflicts. FERC's reading renders the residuary language of section 318 meaningless to that extent, and such constructions are disfavored. *See, e.g., National Ass'n of Recycling Indus. v. ICC*, 660 F.2d 795, 799 (D.C. Cir. 1981). In addition, we note that the Supreme Court has held in an analogous situation that a state's "undoubted jurisdiction over retail rates" does not empower it to redetermine issues underlying FERC-set wholesale rates. *Nantahala Power & Light*, 476 U.S. at 970, 106 S.Ct. at 2358.

Moreover, the purposes for which the SEC is to exercise jurisdiction are not as limited as FERC describes them. The ALJ, whose reasoning was affirmed by FERC, 39 F.E.R.C. at 61,275, described the SEC's purposes as ensuring "that no one of the associated companies takes advantage of any other," *Ohio Power Co.*, 25 F.E.R.C. ¶ 63,060, at 65,183 (1983), and "keeping a reasonable arm's length relationship between the two associated companies." *Id.*

These are true statements as far as they go, but they disregard the SEC's statutory charge to exercise its power in the interest of consumers, as well as of investors and the public, and "to insure that such contracts are performed *economically and efficiently*," as well as "at cost." 15 U.S.C. § 79m(b) (emphasis added). Whether

and how well the SEC has discharged the full scope of its statutory duties was not before FERC and is not before us. It is sufficient for present purposes that the SEC is charged by the statute with regulating the terms of affiliate contracts in the interest of consumers, as well as investors and the public, and has not exempted the instant contract. Moreover, we observe, such purposes as the ALJ imputed to the SEC are barely distinguishable, if at all, from considerations cited by FERC itself in favor of a market test: "protection from the prospect of self dealing," and "a substitute for . . . arms-length negotiations." 39 F.E.R.C. at 61,279. The "economic efficiency" FERC seeks to promote by the market test, *id.*, echoes the "economically and efficiently" language of section 13(b) itself. The market and at-cost tests thus seem simply different means to the same end. When Congress enacted PUHCA, however, it specified a particular means to that end for companies subject to PUHCA, and neither we nor FERC are empowered to overrule that express legislative choice for companies within the jurisdiction of the SEC.

We are not persuaded otherwise by the ambiguous disclaimers of rate-setting authority by the SEC and its staff quoted by FERC in its opinion. *See* 39 F.E.R.C. at 61,277-78. The SEC clarifies nothing we need to understand by disclaiming "ratemaking" authority: plainly, that is not its statutory mandate nor the issue here. The issue is the effect to be given in a ratemaking proceeding to the SEC's price-term regulation. The statement of the SEC staff has little weight, but we note it asserts that the SEC *does* fix a pricing formula and refers to the intermediate steps between its decision and ratemaking in a manner that suggests that the SEC's staff believes that FERC is free to set rates based on *other* considerations. 39 F.E.R.C. at 61,277. *Cf. Nantahala Power & Light*, 476 U.S. at 967-68, 106 S.Ct. at 2357-58. The SEC staff also stated that FERC " 'has jurisdiction to try issues, both of fact and of interpretation, in applying

such orders, insofar as material, to a particular rate case,'" 39 F.E.R.C. at 61,277,[3] but that too is not dispositive of the present question because it does not speak —by its own terms, could not speak—to what considerations govern the effect FERC is to give the SEC's determination.

The purported disclaimer by the SEC itself similarly fails to speak clearly, if at all, to the question before FERC and before us. In *New England Electric System*, Holding Co. Act Release No. 22,309, 24 S.E.C. Docket 298 (Dec. 9, 1981), the SEC had before it New England Power Company's (NEPCO) application for a section 13(b) exemption for the proposed future charter of a collier then under construction. In the paragraphs quoted by FERC, 39 F.E.R.C. at 61,277-78, the SEC determined that it could not then assess whether the complex pricing provisions of the future, twenty-five year charter would conform with section 13(b)'s at-cost requirements. On the other hand, the SEC decided that it would not retain jurisdiction because "other regulatory effects . . . allay our concern." 24 S.E.C. Docket at 307. Specifically, the SEC referred to FERC's FPA jurisdiction: "The rates allowed to NEPCO include, as a cost of service, its cost of fuel, which as allowed to NEPCO may include either the entire cost of transportation under the joint venture's charter to NEPCO, if FERC should determine that it is just and reasonable, or some other amount." *Id.* at 308. Because the case clearly is an exemption case, however, it is unclear whether the SEC was stating (1) its understanding that SEC at-cost determinations are irrelevant to FERC rate-setting determinations or (2) the effects that would follow upon its granting of the exemption and the consequent lifting of whatever bar section 318 might

[3] Quoting "Comment of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206, dated July 31, 1978."

otherwise impose. Because an exemption by the SEC lifts the bar of section 318 to action by FERC, 16 U.S.C. § 825q, we are not persuaded that the decision supports the proposition that FERC may use "some other amount" when the SEC does not grant exemption from the cost standard.

The clearest statement by anyone associated with the SEC on the effect, in the absence of an exemption, of SEC section 13(b) determinations on FERC rate determinations that has been brought to our attention is the prepared statement of the SEC submitted to a congressional committee contemplating amendment of PUHCA. The statement, which advocated repeal of PUHCA, referred to FERC's adoption of a market test for affiliate contracts, the SEC's understanding that section 13 requires a cost standard for such transactions, and the SEC's conclusion that therefore a different federal standard applied to those companies associated with public utility holding companies than applied to those not so associated. *The Public Utility Holding Company Act of 1935: Hearings on H.R. 5220, H.R. 5465 and H.R. 6134 before the Subcommittee on Energy Conservation and Power of the Committee on Energy and Commerce, House of Representatives*, 97th Cong., 2d Sess., at 582-83 (1982). (The SEC's recommendation to repeal PUHCA, of course, was not enacted.)

Finally in this respect, we note that FERC properly has abandoned in this Court its citation below, 39 F.E.R.C. ¶ 61,098, at 61,290 n. 18 & accompanying text at 61,277, of *Mississippi Indus. v. F.E.R.C.*, 808 F.2d 1525, 1550-51 (D.C. Cir. 1987) (per curiam), as authority for its jurisdiction in the present case. The contracts at issue there were characterized as contracts for the sale of electricity between associated companies and therefore outside the scope of the SEC's jurisdiction. *See id.; compare* 15 U.S.C. § 78m(b) *with* 15 U.S.C. § 79b(a)(20).

2. The existence of Conflict

FERC's first-stated, but less important, rationale was that no jurisdictional conflict arises because the SEC *may* require market pricing and "it is not clear," 39 F.E.R.C. at 61,276, that the SEC's orders in the present case impose a cost floor as well as a cost ceiling. As to the first contention, FERC cites the SEC's Rule 92, which provides that the price for seller-produced goods between associated companies may not exceed "the price at which the purchaser might reasonably be expected to obtain comparable goods elsewhere." 17 C.F.R. § 250.92. As to the second, FERC's opinion notes that the SEC orders never state that SOCCO's price must equal cost, only that it will be "based on" and "not exceed" cost. In this Court, FERC points additionally to the boiler-plate character of the language in the SEC orders regarding the interest of the public, investors, and consumers: to the absence of any findings by the SEC on the reasonableness of the SOCCO-OPCO charges; to the absence of any findings that the coal price should be passed through to rate payers; and to the absence of evidence that the SEC was "closely monitoring" all costs to ensure efficiency.

We cannot accept this rationale either because it proceeds from a false premise that the bar of section 318 applies only when there is a present conflict between SEC and FERC prescriptions. The language of section 318 in fact bars FERC jurisdiction whenever a person is "subject . . . to a requirement," 16 U.S.C. § 825q, of PUHCA. OPCO plainly is so subject to section 13(b) with respect to its contractual relations with SOCCO. The fact that FERC's market approach produces a current result that does "not exceed" cost, in the words of the SEC's 1978 and 1980 orders, does not make OPCO any less subject to section 13(b) or to the SEC's orders. In the absence of exemption, it is for the SEC rather than FERC to determine the inter-associate price.

FERC suggests that OPCO may apply to the SEC for approval of a market-based rate. 39 F.E.R.C. at 61,290 n. 17. The suggestion is not well-taken because it reverses Congress's section 318 decision that the SEC has the right of first refusal, as it were, in making such determinations. The statutory scheme simply does not contemplate that FERC will make the determination and then send the subject company to the SEC for a conforming order.

Although it does not affect our decision, we must agree with FERC that it *is* "not clear" from the orders in question that the SEC was particularly mindful of its statutory powers and obligations under section 13(b). The SEC orders devoted some attention to the cost of capital to SOCCO and to the cost of coal to that extent. But it is only to that extent that any concern with the cost of coal is evident. None of the four orders cites section 13, nor mentions expressly whatever purchase agreement exists between SOCCO and OPCO, nor describes any element of costs other than the cost of capital. We note that section 13(b) and the SEC's regulations thereunder do not appc to require submission of and approval of inter-asso te agreements but only conformity of the same with the SEC-promulgated rules. Accordingly, OPCO's assertion that the SEC "approved" the sales agreement between OPCO and SOCCO is problematic, and the references in the orders are consistent with, and may be no more than, references in passing to SOCCO's apparent election of, and unexamined representations of conformity with, the Rule 91 at-cost method. We also note, however, that Rules 90 and 91 are regulations under section 13(b) and as binding thereunder as an individualized order. We note as well that the SEC's 1978 Order *did* require OPCO to submit quarterly reports on the price of coal and how the price was computed. All these matters taken into account, our decision nevertheless rests on the threshold matter of the language of the statute, which commits the determina-

tion of the inter-associate price to the SEC. Whether the SEC acquaints itself well or ill is not our present concern.

B. *Trapped Costs*

Although based upon the language of the statute, our decision is also informed by consideration of the consequences of FERC's action in effectively prescribing an inter-associate price. Accordingly, our decision is buttressed by the consistency of its consequences with Supreme Court precedents that disfavor conflicting regulation resulting in trapped costs. In *Nantahala Power & Light*, the Supreme Court held that it was impermissible for a retail-rate-setting state utility commission to "trap" costs by making a different allocation between related companies of a fixed quantity of low-cost power than had FERC at the wholesale level. 476 U.S. at 970-71, 106 S.Ct. at 2358-59. (The PUHCA was not involved.) In a passage that is particularly instructive, the Court indicated that

> FERC's failure actually to reform the AA [the agreement between the related companies] does not materially alter [the] analysis. FERC ordered Nantahala to adjust its wholesale rates so that its average cost per unit of power reflected an allocation of [low-cost] entitlements power different from the allocation set forth in the AA. The effect of that order is, for purposes of this case, essentially the same as reformation of the agreement itself. . . . By adopting a different allocation, NCUC [the state agency] imputes to Nantahala a different average cost of power, notwithstanding the fact that, under the AA, Nantahala unquestionably is not entitled to demand that [allocation]. Consequently, Nantahala is exposed to "trapped" costs. It must, under NCUC's order, pretend that it is paying less for the power it receives from TVA, under agreements

> not subject to NCUC's jurisdiction, than is in fact the case.

Id. at 971, 106 S.Ct. at 2359. Although the parallels to the present case are not precise, there are two quite clear lessons in the passage: First, it is sufficient that FERC's action in the present case reforms the agreement between OPCO and SOCCO in effect rather than in fact. Second, the cost-trapping "pretense" occasioned thereby is prohibited. In the case of *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, —— U.S. ——, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988), FERC had allocated responsibility for purchasing the expensive power generated by the Middle South Utilities system's Grand Gulf 1 nuclear power plant among the system's multiple operating companies on a certain basis. The State of Mississippi, however, claimed the power to disregard FERC's determination with respect to the operating company within its jurisdiction because FERC had not actually considered the prudence of building Grand Gulf 1 and therefore had not preempted Mississippi's power to do so. The Supreme Court held that *Nantahala Power & Light* controlled and preemption did *not* turn on whether the particular matter of prudence was actually decided by FERC. 108 S.Ct. at 2438-42.

Given the clear and express statutory allocation of jurisdiction between federal agencies in section 318, *Nantahala Power & Light* and *Mississippi Power & Light* are not distinguishable from the present circumstances simply because they involved state-federal relations or because FERC must be re-cast in the role of the respective states with the SEC taking the role formerly played by FERC. As FERC points out, however, the Court did not rule in either *Nantahala Power & Light* or *Mississippi Power & Light* on the authority of a state (and by analogy, FERC in the present circumstances) to second-guess the utility on the *quantity* of price-regulated power it should have purchased when cheaper power was available. 476 U.S. at 972, 106 S.Ct. at 2359; 108 S.Ct. at 2440. That

question has been answered favorably to a state (and, by analogy, favorably to FERC in the present circumstances) in *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 606-11 (3d Cir.1988). We have no occasion to consider this rationale, however. It plainly was not part of FERC's analysis below, and an agency's order must be affirmed on the basis stated in its opinion or not at all. *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141 (1974).

FERC also argues that there is no "trapping" because FERC has stated that it will allow OPCO to recover in its rates, when the facts warrant, a fair market value for its captive coal in excess of its costs therefor. *See Public Serv. Co. of N.M.*, 17 F.E.R.C. ¶ 61,123 (1981) (Opinion No. 133), *aff'd in pertinent part sub nom. Public Serv. Co. of N.M. v. FERC*, 832 F.2d 1201 (10th Cir.1987) (non-SEC case). The difficulty with this element of FERC's argument—and indeed with its present attempt to impose a market-based approach on petitioner's transactions—is that FERC does not, and apparently cannot, explain how OPCO can recover in its rates such a fair market value in excess of cost without running afoul of the SEC's bar in 17 C.F.R. § 250.90(a)(2). *See supra* p. 4. In other words, if we adopt FERC's approach, OPCO faces a tails-we-lose situation when FERC finds that fair market value dictates a captive coal level cost but is prevented by SEC regulation from winning when the other side of the coin comes up. Therefore, attractive as FERC's market approach may be in general, its application to the PUHCA-regulated petitioner adds nothing to FERC's argument in the present case.

III. Conclusion

For the reasons given above, we vacate and remand the decision of FERC. We would like to clarify that there are two issues which we do not address. First, we

do not hold that OPCO and SOCCO or any other SEC-regulated companies are entitled to pay and receive a price in excess of market. *See* 17 C.F.R. § 250.92. Second, we do not hold that FERC may not apply a market test to contracts between related companies that are subject to its jurisdiction but not that of the SEC. *See Public Serv. Co. of N.M.*, 832 F.2d at 1201. We hold only that the statute commits to the SEC such determinations regarding companies associated with a public utility holding company. Basing our decision as we do on this threshold issue, we have no occasion to reach the further issues raised by the petition.

Granted.

MIKVA, Circuit Judge, concurring:

I fully agree with my colleagues that the Federal Energy Regulatory Commission ("FERC") may not escape the strictures of section 318 of the Federal Power Act ("FPA"), 16 U.S.C. § 825q, simply by claiming that it and the Securities and Exchange Commission ("SEC") are not regulating "the same subject matter," for it is clear that both agencies have ruled on the price of coal between Ohio Power Company ("Ohio Power") and its subsidiary, Southern Ohio Coal Company ("Southern Ohio"). *See* Majority Opinion ("Maj. Op.") at 1405-1408.

In my view, however, for section 318 to divest FERC of jurisdiction, a person must also be subject to *conflicting* requirements of the Public Utility Holding Company Act ("PUHCA"), 15 U.S.C. §§ 79 *et seq.*, and the FPA. I base this conclusion not only on the text of the statute, but also because section 13 would otherwise serve no purpose. Applying this interpretation to the case *sub judice*, I am not convinced that the SEC's orders (under the PUHCA) and FERC's decision (under the FPA) are in conflict. Accordingly, I would uphold FERC's determination that section 318 does not bar its jurisdiction in this case.

I concur in the judgment of my colleagues, however, and would grant the petetion for review, on the alternate ground that FERC's decision is contrary to section 35.14 (a)(7) of its own regulations, 18 C.F.R. § 35.14(a)(7).

I.

Section 318 of the FPA provides in relevant part:

> If, with respect to the issue, sale, or guaranty of a security, * * * or the acquisition or disposition of any security, capital assets, facilities, or *any other subject matter*, any person is *subject both to a requirement* of the Public Utility Holding Company Act of 1935 * * * *and to a requirement* of this chapter * * *, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this chapter * * * *with respect to the same subject matter*, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this chapter shall apply to such person.

16 U.S.C. § 825q (emphasis added). As I parse this provision, there is a jurisdictional conflict (and FERC must yield jurisdiction to the SEC) if, and only if, a person is subject to a conflicting "requirement" of both PUHCA and the FPA, and the requirements are "with respect to the same subject matter." The first condition is a logical necessity, for even if there is dual jurisdiction over "the same subject matter" (the second condition), if there is no conflict, then there is no need for FERC to yield to the SEC.

As noted above, I agree with my colleagues that the second condition has been met in this case: FERC and the SEC are clearly regulating the same subject matter, namely, the price of coal between Ohio Power and Southern Ohio. I am not so sure, however, that there is a conflict between the relevant SEC orders and FERC's decision below.

In 1971, the SEC (pursuant to the PUHCA) authorized the formation of Southern Ohio on the condition, *inter alia*, that "[t]he charges for coal by Southern Ohio will be *based on an amount equal to the actual cost* of Southern Ohio in developing the reserve and mining such coal, * * *." Ohio Power Co., Release No. 17,383, at 2 (Dec. 2, 1971) (SEC) (emphasis added). In its 1978 order approving the transfer of certain mine and other coal properties from Ohio Power to Southern Ohio, the SEC further stated that "[t]he price at which SOhio coal is sold to AEP System companies *will not exceed the cost thereof* to the seller." Ohio Power Co., Release No. 20,515, 14 SEC Docket 928, 929 (Apr. 24, 1978) (emphasis added).

In the decision below, FERC (pursuant to the FPA) ruled that, based on the market price for comparable coal, the price Ohio Power paid for Southern Ohio coal was unreasonably high; FERC therefore disallowed Ohio Power's request for a rate increase based on those costs. 39 FERC ¶ 61,098, at 61,285-86 (1987), *reh'g denied*, 43 FERC ¶ 61,046 (1988).

In this petition, Ohio Power maintains that there is a jurisdictional conflict by arguing (and, incidentally, implicitly conceding that section 318 requires a conflict) that section 13(b) of the PUHCA, 15 U.S.C. § 79m(b), mandates a cost standard and that, in any event, the SEC in this case required Southern Ohio to set its price at cost. I disagree.

Although section 13(b) includes the phrase "at cost," Congress intended section 13(b) to avoid "*excessive* charges" resulting from the lack of arm's-length bargaining and open competition between public utility holding companies and their subsidiaries. PUHCA § 1(b)(2)

(emphasis added), 15 U.S.C. § 79a(b)(2); *see also North American Co. v. SEC*, 327 U.S. 686, 701 & n. 11, 66 S.Ct. 785, 794 & n. 11, 90 L.Ed. 945 (1946) (citing congressional findings underlying section 1(b)). The SEC has interpreted section 13(b) to mean that "[n]o subsidiary company of a registered holding company * * * shall perform any service or construction for, or sell any goods to, any associate company therefore, or enter into any contract to do so, at *more than cost* * * *." 17 C.F.R. § 250.90(a)(2) (emphasis added). Indeed, the SEC even permits a market-price test for the sale of goods between such affiliates. *See* 17 C.F.R. § 250.92(b). I cannot conclude that section 13(b) necessarily mandates strict at-cost pricing between public utility holding companies and their associates.

Ohio Power also argues that, in any event, the SEC did not authorize a market approach in this case. But this argument is misplaced, for the issue is whether there is a conflict in requirements under the two statutes. Because the SEC in 1978 limited the price of coal only to *cost as a ceiling*, *see* Ohio Power Co., Release No. 20515, 14 SEC Docket 928, 929 (Apr. 24, 1978), I find no conflict between that requirement and FERC's requirement that Ohio Power pay market price, where, as in this case, the market price is less than cost. The SEC's 1971 order is not to the contrary, for it requires only that the price be "based on" cost; the later order imposing cost as a ceiling is certainly "based on" cost.

Moreover, as my colleagues note, *see* Maj. Op. at 1408-09, the SEC's approval of the various transactions was grounded on the financial aspects of the corporate arrangements, not on the reasonableness of the price paid for the coal. Ohio Power therefore reads too much into the SEC orders when it claims that the SEC expressly conditioned its approval of the affiliate arrangement on a strict cost-based standard—Ohio Power relies too heavily on what seems to be merely boilerplate language. Accordingly, because I read the SEC's orders to permit Ohio Power to pay less than cost for the coal, FERC's imposition of a market price less than cost does not in this case create a jurisdictional conflict. As FERC stated below: "it is not clear that the SEC requires Ohio Power to purchase coal from its subsidiary at cost, rather than at market price. The SEC orders which Ohio Power cites for this proposition * * * do not appear to mandate the cost-based price where a market price would be lower, rather they permit a price up to a cost-based price." 39 FERC at 61,276.

In short, although Ohio Power has met the second condition of section 318 (both agencies are regulating the "same subject matter," namely, the reasonableness of the price paid), it has not met the first. Under the facts of this case, the SEC has not precluded a price *less than* cost; FERC's setting of the allowable price at a market price less than cost therefore does not create a conflict that would bring section 318 into play.

I note in passing that, under my view, if FERC had sought to impose a price *higher than* cost (i.e., if the market price determined by FERC were higher than cost), then FERC's requirement would clearly conflict with the SEC's requirement and, under section 318, FERC would have to abide by the SEC's determination. This implies that, in a case where the SEC has set cost as a ceiling, FERC has jurisdiction to impose a market price only if that price is less than cost. FERC in dictum below, however, would have permitted Ohio Power to recover the market price even if that price exceeded cost. *See* 39 FERC at 61,287-88. Although this is a problematic aspect of the decision below, we need not pass on its validity under section 318, for that case is simply not before us today.

II.

Ohio Power argues in the alternative that, even if section 318 does not apply, section 35.14(a)(7) of

FERC's own rules bars it from imposing its market-price test. I would agree and grant the petition on this ground.

Section 35.14(a)(7), which governs fuel price adjustment clauses in filed rate schedules, provides in pertinent part:

> Where a utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, *such cost shall be deemed to be reasonable* and includable in the adjustment clause.

18 C.F.R. § 35.14(a)(7) (emphasis added). There is no dispute that this rule applies to the transaction in this case; the only issue on appeal is the meaning of the word "deemed." FERC, affirming the administrative law judge on this point, found that the regulation creates only a rebuttable presumption of reasonableness. *See* 39 FERC at 61,287-88. Ohio Power challenges this conclusion, arguing that the word "deemed" establishes instead a conclusive presumption.

The applicable standard of review is clear. Although a reviewing court must defer to an agency's interpretation of its own rules, *see Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1503 (D.C. Cir. 1987), no deference is owed an interpretation at odds with the plain meaning of the text, *see Union of Concerned Scientists v. NRC*, 711 F.2d 370, 381 (D.C. Cir. 1983) ("When an agency's interpretation flies in the face of the language of the rules themselves, it is owed no deference.").

Although the provision at issue has apparently not been interpreted in any published opinion, courts construing the word "deemed" have generally found that it establishes a conclusive presumption. *See H.P. Coffee Co. v. Reconstruction Finance Corp.*, 215 F.2d 818, 822 (Emer. Ct. App. 1954) (finding "almost unanimous judicial determination that the word ['deemed'], when employed in

statutory law, creates a conclusive presumption") (citing cases); *see also Dameron v. Brodhead*, 345 U.S. 322, 326-27, 73 S.Ct. 721, 723-24, 97 L.Ed. 1041 (1953) (rejecting, in a case involving state taxation of a serviceman's personal property, the argument that "deemed" implies a rebuttable presumption, because such a construction would nullify the statute); *Kyzar v. Califano*, 597 F.2d 68, 71 (5th Cir. 1979) (where statute provided that an insured child is "deemed dependent" upon a stepparent if the child was living with the stepparent at the time of death of the natural parent, Congress intended that dependency would be conclusively established upon proof of the objective criteria); *Kohn v. Myers*, 266 F.2d 353, 357 (2d Cir. 1959) ("The word 'deemed' gives rise to a conclusive presumption or substantive rule of law that the acquisition of assets from a bankrupt after a petition of bankruptcy is filed is not in good faith if the transferee knew the petition was pending and did not have reasonable cause to believe that it was not well founded."). Numerous state court decisions, too many to list here, are in accord.

Moreover, if the intent of the regulation were to create a rebuttable presumption, as FERC now contends, then the rule would be superfluous, for it has long been settled that a utility's costs are presumed (subject to rebuttal) to be prudently incurred. *See Missouri ex rel. Southwestern Bell Telephone Co. v. Missouri Pub. Serv. Comm.*, 262 U.S. 276, 289 n. 1, 43 S.Ct. 544, 547 n. 1, 67 L.Ed. 981 (1923); *Anaheim v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981).

The history of section 35.14(a)(7) also supports Ohio Power's reading of the provision, for FERC has twice proposed and rejected a different rule to accomplish the result that it now claims flows from the existing rule. First, as originally proposed by the Federal Power Commission ("FPC") in 1973, the regulation did not contain the "deemed" language:

> Where the cost of fuel includes fuel from company owned or controlled sources, that fact shall be noted and described as part of any filing. *Only the reasonable cost of such fuel may be included. Amounts collected from customers in excess of such reasonable cost shall be subject to refund.*

38 Fed. Reg. 17,253 (1973) (emphasis added). Only the unitalicized sentence has been retained in the current regulation. After public comment, the second and third sentences were modified to its current version:

> Where the cost of fuel includes fuel from company-owned or controlled sources, that fact shall be noted and described as part of any filing. *Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed reasonable and includable in the adjustment clause.* * * * Fuel charges which do not appear to be reasonable may result in the suspension of the fuel adjustment clause or cause an investigation thereof to be made by the Commission on its own motion under section 206 of the Federal Power Act.

39 Fed. Reg. 28,911 (1974) (emphasis added). When the rule was eventually promulgated, the FPC explained that "[t]he modification provide[s] that when a utility purchases fuel from an owned or controlled source and the price is subject to the jurisdiction of a regulatory body, the cost of the fuel *may be included* in the fuel adjustment clause." 39 Fed. Reg. 40,583 (1974) (emphasis added). The addition of the "deemed" language suggests, albeit weakly, that the prior version, which was rejected and which provided no special treatment for affiliate fuel purchases subject to the jurisdiction of another regulatory body, would have accomplished the result FERC now seeks to impose.

Second, in 1979 FERC proposed to amend section 35.14(a)(7) to require utilities to file, as rate schedules,

all contracts for fuel purchases from company-owned or company-controlled sources, regardless of whether the price was subject to the jurisdiction of a regulatory body. *See* 44 Fed. Reg. 28,683 (1979). The stated purpose of this proposal was "to further aid the Commission in fulfilling its responsibility to ensure that utilities are purchasing fuel at reasonable prices and that only allowable costs are being passed through in the fuel cost adjustment clause." *Id.* at 28,684; *see also* 45 Fed. Reg. 82,272 (1980). Although FERC later determined that its adoption of a market-price test for determining the reasonableness of affiliate fuel costs made the proposed revision unnecessary, *see* 50 Fed. Reg. 24,779 (1985), it is significant that FERC's proposal would have been superfluous had the provision already established merely a rebuttable presumption of reasonableness, because there would have been no question that FERC would have had independent jurisdiction to review the contracts.

FERC relies heavily on an interpretation of the section in a 1975 FPC chairman's letter to a Senate Subcommittee, but that letter is not persuasive. The letter merely states that section 35.14(a)(7) creates "a presumption of reasonableness" without specifying whether the presumption is rebuttable or conclusive. *The Utility Act of 1975: Hearings on S. 594 Before the Subcomm. on Intergovernmental Relations, Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 500, 514 (1975).

Finally, FERC argues that its statutory mandate to ensure that rates are just and reasonable implies that section 35.14(a)(7) cannot be read to foreclose FERC from independently determining the reasonableness of wholesale utility charges. But this argument is valid only if one ignores section 35.14(a)(7). Although, as a general matter, FERC may have the authority to make an independent determination of reasonableness, section 35.14(a)(7) forecloses such a route to the extent that

the price is already subject to the jurisdiction of another regulatory body. In other words, section 35.14(a)(7) establishes, as a policy matter, that if another regulatory body has already passed on the fuel price, then FERC will abide by that determination. This reading is entirely consistent with the purpose of section 35.14(a)(7), which is to avoid unreasonable fuel costs between affiliated companies, for if another agency (e.g., the SEC) has already made that determination, then there is no reason for FERC to second-guess that decision.

* * * *

I concur with my colleagues that the petition for review should be granted, but not on the basis of section 318 of the FPA. I do not find, in this case, a collision between the two agencies operating in this field. Rather, I would find that FERC erroneously construed section 35.14(a)(7) of its regulations to establish merely a rebuttable presumption of reasonableness. Under the regulation, because the prices of Ohio Power's fuel from its affiliate are subject to the jurisdiction of the SEC, such costs must be conclusively presumed reasonable.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,
OHIO MUNICIPALS,
Intervenors.

Before: MIKVA, SILBERMAN and SENTELLE, Circuit Judges

ORDER

[Filed Oct. 12, 1989]

Upon consideration of the Petitions For Rehearing of Respondent Federal Energy Regulatory Commission and Intervenor Ohio Municipals, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Mikva would grant the petitions for rehearing. His statement is attached.

Statement of MIKVA, Circuit Judge

I would grant the petition for rehearing by the panel. I continue to be concerned that the panel opinion creates a regulatory gap that can be mischievous in future cases. As I state in my concurring opinion when the case was originally heard, there is no conflicting requirement imposed by the agencies involved with respect to the same subject matter. Accordingly, the Federal Energy Regulatory Commission (FERC) was not ousted of its jurisdiction over the price of coal charged to Ohio Power Company. The flaw in FERC's decision stems from a fatal conflict with its own regulations, and warrants granting the petition for review, as the panel decision ordained. The statutory interpretation engaged in by the majority, however, generates a no-man's land where neither the Securities and Exchange Commission (SEC) nor FERC will patrol holding company practices which can oppress consumers, investors and the public. Congress did not intend and our court should not construct such a result.

Because the result in the instant petition would not be affected by my interpretation of the relevant statutes, I do not call for a rehearing by our full court. I do continue to express a concern about what I perceive to be a flawed parsing of the statutes involved in this important and delicate area of interagency administration of the law.

APPENDIX C

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. ER82-553-000 and ER82-554-000

OHIO POWER COMPANY

Opinion No. 272; Opinion and Order on Recovery of the Cost of Coal Purchased From an Affiliate

(Issued April 30, 1987)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Initial Decision of the presiding administrative law judge, issued December 14, 1983, appears at 25 FERC ¶ 63,060.]

Appearances

Edward J. Brady, Marvin I. Resnick, Alan Kessler, and *William E. Olson* for Ohio Power Company

William H. Roberts and *Richard Hitt* for Public Service Commission of West Virginia

Paul Nordstrom, Glen L. Ortman, Kenneth E. Natale, Donald R. Allen, David P. Yaffe, and *Gregg D. Ottinger* for the Municipal Wholesale Electric Customers of Ohio Power Company

Phillip Nelson and *O.C. Hall* for Wheeling Electric Company

James D. Kauffelt for Linden Chemicals and Plastic, Inc., Mobay Chemical Corporation, and PPG Industrials, Inc.

Melvin Berger, Arthur Hays Butler, Lawrence R. Greenfield, Michael Small, James E. Rogers, Jr., Marilyn L. Doria, Harvey L. Reiter and *Daniel Watkiss* for the staff of the Federal Energy Regulatory Commission

[Opinion No. 272 Text]

I. Introduction and Summary

On May 28, 1982, the Ohio Power Company (Ohio Power) filed rate increases for its wholesale service to fifteen municipalities in the State of Ohio (Docket No. ER82-553-000) and to its affiliate in West Virginia, the Wheeling Electric Company (Docket No. ER82-554-000). The Commission accepted settlements dealing with all aspects of the proposed rates except what was called the captive coal issue which involves a challenge to the reasonableness of the fuel costs recovered from Ohio Power's wholesale customers for the coal it purchased from the Martinka mine.[1]

The Martinka mine is owned and operated by the Southern Ohio Coal Company, a wholly owned subsidiary of Ohio Power. Ohio Power is owned by the American Electric Power Company (AEP). AEP owns seven other electric utilities that operate as a coordinated system in a seven-state area. AEP is subject to regulation by the Securities and Exchange Commission (SEC) under the Public Utility Holding Company Act of 1935 (PUHCA).[2]

An initial decision on the reasonableness of Ohio Power's coal costs was issued on December 14, 1983.[3] In the initial decision the presiding judge found that:

(1) section 318 of the Federal Power Act does not preclude the Commission from determining whether it is just and reasonable for Ohio Power to recover the full cost of its purchases from the Martinka mine from its wholesale ratepayers;

(2) the Commission's fuel adjustment clause regulation[4] creates only a presumption which does not preclude the Commission from considering the reasonableness of Ohio Power's fuel costs;

(3) Ohio Power's coal costs are subject to a comparable market price test as adopted in Opinion No. 133[5] to determine the reasonableness of those costs; and

(4) the comparable market price evidence presented to show that Ohio Power's costs were not reasonable was not credible.

The judge concluded that the prices paid by Ohio Power for Martinka coal were reasonable.

Briefs on exceptions to the initial decision and briefs opposing exceptions were filed by Ohio Power, Commission trial staff (staff), and the Municipal Wholesale Electric Consumers of Ohio Power (the municipals).[6]

Ohio Power excepts to the judge's ruling on the preemptive effect of section 318 of the Federal Power Act and section 35.14(a)(7) of the Commission's regulations on the Commission's review of Ohio Power's coal costs.

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[1] *See Ohio Power Company*, 23 FERC ¶ 61,236 (1983) and 24 FERC ¶ 61,017 (1983).

[2] 15 U.S.C. § 79a (1982).

[3] 25 FERC ¶ 63,060 (1983).

[4] 18 C.F.R. §35.14(a)(7) (1986).

[5] *Public Service Company of New Mexico (New Mexico)*, 17 FERC ¶ 61,123 (1981), *appeal pending sub nom. Public Service Company of New Mexico v. F.E.R.C.*, Nos. 82-1148, 84-1624 and 84-1677 (10th Cir., filed Feb. 3, 1982).

[6] On May 15, 1986, New England Power Company (NEP) filed a motion with the Commission for permission to file an *amicus curiae* brief in this proceeding; our staff, the municipals, the Town of Norwood, Massachusetts, the Attorney General of Rhode Island, and the Rhode Island Division of Public Utilities and Carriers oppose NEP's motion. Because of the lateness of the filing without good cause the Commission shall deny the motion.

Ohio Power argues that the Commission can change its regulations only prospectively. Ohio Power also objects to the imposition of a comparable market price test on a utility subject to PUHCA asserting that the result would be a lower of cost or market price test, a result which Ohio Power asserts would be confiscatory. Ohio Power further urges that as a factual matter Ohio Power's ownership of affiliate mines serves the purpose of delivering the lowest priced electricity possible. Staff and the municipals except to the judge's rejection of staff's evidence as a reliable determinant of comparable market prices.

We affirm the judge's rulings and reasoning regarding the Commission's authority, pursuant to the Federal Power Act and our regulations, to determine the reasonableness of coal costs Ohio Power recovers from its wholesale customers. We disagree, however, with the judge's finding that those costs were reasonable. We find the costs Ohio Power has recovered for its purchases of Martinka coal are unreasonable when compared with market prices and that Ohio Power therefore must refund amounts collected since the effective date of the rates in this proceeding that exceed the comparable market price.

II. Discussion

A. Commission Jurisdiction to Review Ohio Power's Coal Costs

1. Section 318 of the Federal Power Act

Ohio Power urges that under PUHCA and section 318 of the Federal Power Act, the SEC has exclusive jurisdiction over the pricing of the affiliate Martinka coal.[7] The presiding judge concluded that section 318 of the Federal Power Act[8] does not preclude this Commission

[7] Ohio Power brief on exceptions at 17-36.

[8] 16 U.S.C. § 825q (1982).

from determining whether it is just and reasonable for Ohio Power to recover from its wholesale cutomers, in its rates, the full cost of its purchases from the Martinka mine.[9]

The source of the SEC's authority to regulate the price at which Ohio Power purchases coal from its subsidiary is section 13 of PUHCA.[10] Ohio Power contends that section 13(b) of PUHCA mandates that it purchase coal from its subsidiary at cost.[11] Ohio Power contends that if the Commission orders that Ohio Power may recover in rates only a market-based amount for the Martinka coal, that Ohio Power will face conflicting regulation by the SEC and the Commission which is prohibited by section 318 of the Federal Power Act. Section 318 provides:

> If, with respect to the issue, sale, or guaranty of a security . . . , *or any other subject matter*, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 . . . and to a requirement of this Act . . . the requirement of the Public Utility Holding Company Act of 1935 shall

[9] 25 FERC at p. 65,183.

[10] 15 U.S.C. § 79m (1982).

[11] The relevant portions of section 13(b) of PUHCA, 15 U.S.C. § 79m(b) (1982), provide:

> [I]t shall be unlawful for any subsidiary company of any registered holding company or for any mutual service company . . . to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the [Securities and Exchange] Commission by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies.

> apply to such person, and such person shall not be subject to the requirement of this Act . . . *with respect to the same subject matter*, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this Act shall apply to such person. (Emphasis supplied.)

The judge concluded that, assuming the SEC set the price at which Ohio Power may purchase its subsidiary's coal, there was no conflict of jurisdiction because the SEC regulates the intra-corporate price of coal between Ohio Power and its subsidiary, while this Commission sets rates.[12] The judge concluded that the same subject matter is not subject to the requirements of both PUHCA and the Federal Power Act.[13] We agree with the judge.

First, it is not clear that the SEC requires Ohio Power to purchase coal from its subsidiary at cost, rather than at market price. The SEC orders which Ohio Power cites for this proposition state that the charges for the coal "will be based on actual cost," [14] and "will not exceed the cost thereof to seller." [15] These orders authorized financing for the coal mining subsidiary. They do not appear to mandate the cost-based price where a market price would be lower, rather they permit a price up to a cost-based price.

The SEC's Rule 92 implements in part section 13 of PUHCA. The rule prohibits a subsidiary of a registered holding company from selling

> any goods produced by it to any associate company thereof, or enter into any contract to do so, at a

[12] 25 FERC at p. 65,183.

[13] *Id.*

[14] SEC 1935 Act Release No. 17383, Dec. 2, 1971.

[15] SEC 1935 Act Release No. 21537, April 25, 1980.

> price which exceeds the price at which the purchasers might reasonably be expected to obtain comparable goods elsewhere, or to finish them itself, giving due regard to quality, quantity, regularity of supply, and other factors entering into the calculation of a fair price.[16]

Thus it appears that not only does the SEC not require a cost-based price for the subsidiary coal, the SEC may require a market-based price for subsidiary coal if the market price is lower than cost.[17]

More importantly, assuming that the SEC has actually affirmatively set the price which Ohio Power must pay its subsidiary for the Martinka coal, setting the intra-corporate price and setting rates are not the same subject matter which would bring section 318 into play. We have taken full account of the fact that the SEC has jurisdiction, under PUHCA, to regulate the price of coal purchased by Ohio Power from the Martinka mine. The SEC's jurisdiction, however, does not extend to setting rates and determining what fuel costs Ohio Power may collect from its wholesale customers. There is thus no

[16] 17 C.F.R. § 250.92 (1986).

[17] The SEC can, pursuant to section 13(b), authorize a market-based price for a transaction between a subsidiary and parent even when that market-based price exceeds cost. *See*, New England Electric System, 1935 Act Release No. 22309, 24 SEC Docket (1981), where the SEC, pursuant to the provisions of section 13(b), exempted a contract from the cost limitation of 13(b) so that a market-based approach could be used. Thus Ohio Power could apply to the SEC for approval of a market-based pricing mechanism for its affiliate coal if it so desired. *See also*, "Comment of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206 dated July 31, 1978" filed in Docket No. E-9206, on October 27, 1978, at 3. Therefore as a factual matter, it does not appear that Ohio Power is accurate in stating that a company subject to SEC jurisdiction pursuant to PUHCA is required always to sell its products to an affiliate at cost-based prices.

conflict in the regulation by the SEC and the regulation by this Commission.[18]

The SEC's Division of Corporate Regulation submitted comments in another Commission case involving AEP affiliate coal purchases in which staff of the SEC explained its view of the effect of SEC orders approving the financing of coal mining subsidiaries under PUHCA.[19] These comments demonstrate that the SEC recognizes that it does not set rates:

> The orders of the SEC under the 1935 Act do not set rates for operating utility companies. There is no conflict with FERC jurisdiction. In setting rates, FERC is legally bound to give due consideration to cost of service, which certainly includes cost of fuel burned, but there are a number of intermediary steps between our order authorizing an affiliate to acquire and mine coal reserves and the rate determination . . . .
>
> The SEC pricing orders are final orders directed, in conjunction with the 1935 Act and the pertinent rules, to fixing a pricing formula until further order of the Commission. It is the rate making authority,

[18] *See Mississippi Industries v. F.E.R.C.*, 808 F.2d 1525, 1550-51 (D.C. Cir. 1987). Appalachian Power Company, another AEP owned utility, raised the same contention regarding SEC regulation in *McDowell County Consumers Council, Inc. v. American Electric Power (McDowell County)*, Docket No. E-9206. The Commission, in setting AEP's coal purchasing practices for investigation, responded that its investigation was "instituted for the purpose of fulfilling this Commission's statutory obligation as expressed in Sections 202, 205, 206, 301, 306, 307 and 309 of the Federal Power Act which are in no way repugnant to the exercise of any authority which the SEC may choose to assert under its statute." *See* 54 FPC 361, 363 (1975).

[19] "Comment of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206, dated July 31, 1978."

> not the SEC, that has jurisdiction to try issues, both of fact and of interpretation, in applying such orders, insofar as material, to a particular rate case.

Moreover, the SEC itself, as opposed to its staff, has recognized that its regulation of fuel-related costs, pursuant to section 13(b), is not in conflict with and does not preclude this Commission setting rates. In *New England Electric System* the SEC authorized a joint venture in which a registered holding company and two of its subsidiaries would participate in building a coal-fired collier. The SEC, pursuant to section 13(b), exempted the transaction from the cost limitations of 13(b), so that the transportation approved by the SEC was at a market-based price which was expected to exceed cost. The SEC commented on the relationship of its regulation under section 13(b) of PUHCA and this Commission's rate regulation:

> We cannot assess now, when the vessel is under construction, the extent to which the price to be determined under the charter will exceed cost under Section 13(b). Nor are we inclined to reserve jurisdiction over the adjustments and redefinitions under the charter as they develop over the next quarter century. The charter with NEPCO has other regulatory effects, not under the Act we administer, that in this case better serve the purpose and allay our concern.

NEPCO is engaged in the production, transmission and sale, at wholesale, of electric energy, essentially to the utility associate companies in the NEES system. It is a public-utility as defined in section 201(e) of the Federal Power Act and its rates are subject to FERC jurisdiction under section 206 thereof. The rates allowed to NEPCO include, as a cost of service, its cost of fuel, which as allowed to NEPCO may include either the entire cost of transportation under the joint venture's charter to NEPCO, if FERC

should determine that it is just and reasonable, or some other amount.

Our grant of the exemption does not affect FERC's authority over rates; and the bilateral arrangement under the charter following upon the exemption does not prescribe what should be allowed to NEPCO in revenues from its wholesale power customers for transportation costs, either in allowed rates or under the fuel adjustment clause. These adjusting effects provide us sufficient assurance to determine that the exemption from cost remains consistent with the policy of section 13(b). In relying on this ratemaking process we do not cede any of our statutory responsibilities to another agency.[20]

We believe that the SEC's analysis that its determination pursuant to section 13(b) of PUHCA does not affect our authority to make rate determinations is in accord with the presiding judge's conclusion that the SEC's regulation pursuant to section 13(b) of PUHCA does not preclude this Commission from determining the reasonableness of Ohio Power's coal costs during the ratemaking process. We shall affirm the judge's determination on this issue.

2. Section 35.14(a)(7) of the Commission's Regulations

Ohio Power contends that section 35.14(a)(7) of our regulations[21] precludes this Commission from looking at the price of the Martinka coal because that coal is subject to SEC and Ohio PUC regulation. Section 35.14(a)(7) provides in part that "where a utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and

[20] 24 SEC Docket at 307-08.

[21] 18 C.F.R. § 35.14(a)(7) (1986).

includable in the adjustment clause." Ohio Power argues that we cannot change the regulation without notice to those affected.[22]

The judge concluded that section 35.14(a)(7) creates a rebuttable presumption of reasonableness.[23] We agree. As the judge noted, in 1975, six months after promulgation of section 35.14(a)(7), the Chairman of the Federal Power Commission submitted a letter to the Senate Subcommittee on Reports, Accounting and Management, stating that section 35.14(a)(7) creates a presumption of reasonableness, not a conclusive finding of reasonableness. There is thus no retroactive change of a regulation involved in this case.[24]

B. Determining the Reasonableness of Ohio Power's Affiliate Fuel Purchases

Prior to Opinion No. 133 the reasonableness of affiliate coal purchases were determined on a cost-of-service basis.

[22] Ohio Power brief on exceptions at 57.

[23] 25 FERC at p. 65,184.

[24] ABP, and its affiliates, had actual notice of the Commission's belief that section 35.14(a)(7) of its regulations does not preclude a comparable market-price investigation into its affiliate coal purchases. The same issue was involved in *McDowell County*. Eight months after promulgation of section 35.14(a)(7), the Commission instituted an investigation of AEP's coal purchasing practices, including its purchases from affiliate coal companies which were subject to SEC regulation. 54 FPC 361 (1975). The Commission ordered that the investigation "include all coal contracts whether or not required to be submitted pursuant to Commission Order No. 517, 52 FPC 1304," the order promulgating section 35.14(a)(7). The Commission later ordered hearings on the coal cost issue pursuant to sections 205 and 206 of the Federal Power Act. 15 FERC ¶ 61,257, at p. 61,592-93 (1981).

Moreover, the SEC had made its determination before this proceeding was set for hearing at this Commission. Had the Commission considered the SEC determination to be conclusive, as Ohio Power contends, the issue of Ohio Power's coal costs would not have been set for hearing.

Under the Commission's regulation at section 35.14(a)(7), affiliate coal purchases which were subject to the regulation of another agency were deemed to be reasonable. If the affiliate transactions were not subject to the regulation of another agency, the utility was required to justify the reasonableness of the cost of the affiliate coal.

In Opinion No. 133, the Commission tested the reasonableness of prices of affiliate coal purchases by comparing them to prices available from non-affiliated suppliers in a competitive market. The Commission found that "the interests of consumers will best be protected by permitting utilities that purchase coal from affiliates to recover no more from their ratepayers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier." [25]

Although the Federal Power Act does not mandate a market-price test to determine the reasonableness of affiliate transactions, there is no legal impediment to the use of such a test,[26] and there are a number of reasons arguing for its use. The Commission noted in Opinion No. 133 that companies that are subject to the competitive market are more efficient and innovative than those assured of a recovery of costs and a reasonable return, and that a market-price limitation on fuel expense recovery from affiliated suppliers provides the best incentive for utilities to develop the least costly sources of fuel.[27] In addition to the economic efficiency promoted by a market-price test, it provides protection from the prospect of self-dealing that arises in transactions between affiliates.

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[25] 17 FERC at p. 61,246.

[26] It is noteworthy that the Natural Gas Policy Act, 15 U.S.C. §§ 3311-3432 (1982) establishes the comparable market price as the ceiling for a just and reasonable amount a pipeline may pay an affiliated producer for gas. *See* section 601(b)(1)(E), 15 U.S.C. § 3431(b)(1)(E) (1982).

[27] 17 FERC at p. 61,246.

What the Commission noted in stating the purpose of the comparable market-price test required by the Natural Gas Policy Act, for transactions between pipeline affiliates, is equally applicable to purchases from affiliates by electric utilities: "At the heart of section 601(b)(1)(E) is the simple notion that a pipeline may not grant a price preference to its affiliate." [28] In a *New Mexico* proceeding subsequent to Opinion No. 133, the Commission characterized the comparable market-price test as "an objective test" that prevents rate manipulation.[29] It provides a substitute for the arms-length negotiations that provide objectivity and fair dealing in non-affiliate transactions.

The Commission has not deviated from its continued support for a market-price test. As recently as 1985 the Commission reaffirmed its departure from a cost-based test of reasonableness for affiliate transactions. The enunciation of the market-price test in Opinion No. 133 was given by the Commission as its reason for terminating a 1979 rulemaking that had proposed to amend section 35.14(a)(7) to delete the provision deeming reasonable coal costs that were subject to the jurisdiction of another regulatory agency and to require that utilities file affiliate coal contracts regardless of jurisdiction by another agency.[30] The Commission, noting that the amendment to its regulations was proposed to effect the cost-based policy in effect when the proposal was issued,

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[28] *El Paso Natural Gas Company*, 23 FERC ¶ 61,216, at p. 61,449 (1983).

[29] Opinion No. 164, 23 FERC ¶ 61,218, at p. 61,457 (1983).

[30] Termination of Rulemaking Dockets, 50 Fed. Reg. 24,779 (June 13, 1985), *FERC Statutes and Regulations, Proposed Regulations 1977-1981* ¶ 32,409, at p. 33,169; Revision of Fuel Cost Adjustment Clause Regulations Relating to Fuel Purchases from Company-Owned or Company-Controlled Sources, 44 Fed. Reg. 28,683 (May 16, 1979), *FERC Statutes and Regulations, Proposed Regulations 1977-81* ¶ 32,022.

found that the filing of contracts was no longer necessary because of the departure from that policy and the adoption of a market-price test.[31]

Under a market-price test, the question in this proceeding is whether the price at which Ohio Power purchased Martinka coal from its affiliate is reasonable when compared with prices in the market for alternative supplies.

1. Establishing Comparable Market Prices

To establish a benchmark market price, staff identified other coal-fired electric generating plants within 50-, 75- and 100-mile radiuses of the Mitchell plant that use coal with sulfur content and Btu heat content comparable to that used at Mitchell,[32] and calculated the weighted average prices of contract coal delivered to those plants. The prices were taken from FERC Form 423 and were increased by 3.1%.[33]

The prices compared are the delivered prices, thus including the costs of transportation. Staff's study shows that there are no significant differences between the weighted average cost of comparable coal delivered within

[31] *FERC Statutes and Regulations, Proposed Regulations 1977-1981* ¶ 32,409, at p. 33,169.

[32] *See, e.g.*, Ex. 13, Ex. 15 at 13-22, Tr. at 992-93. There is a high concentration of coal-fired electric plants in the vicinity of the Mitchell plant.

[33] Form 423 was designed to collect data on the cost and quality of fuel used for generating electricity. Among other things, the data facilitates comparison of the costs of captive and non-captive coal. *See* Change in Public Availability of FPC Form 423—Data on Cost and Quality of Fuels for Electric Plants, Docket No. RM77-2, 44 Fed. Reg. 21,596 (April 10, 1979), 6 FERC ¶ 61,208, at p. 61,520 (1979). The increase of 3.1% from the prices reported in Form 423 is based on a one-month audit by the Energy Information Administration of the Department of Energy which found that reporting utilities had understated their costs by this percentage.

50 miles of Mitchell and the cost of such coal delivered within the 75- and 100-mile radiuses. Staff ultimately relied, therefore, on prices within the 50-mile radius to establish the comparable market price. Within that radius, there were 13 plants which burned coal with a sulfur content of 1-4%, the range of sulfur content in the coal burned at Mitchell (including Martinka coal and other coal).

The average prices of the coal at the 13 plants in staff's study and the prices Ohio Power paid for Martinka coal are as follows:

	*Comparable Coal (1-4% sulfur)**	*Martinka Coal*	*Percentage Difference*
1980	123.2MMBtu	184.9¢/MMBtu	50%
1981	138.4	268.7	94%
1982	155.4	206.8	33%

* Adjusted up by 3.1% from Form 423 data.

(a) Characteristics of Comparable Coal

A comparable market price is the price of coal that is suitable for use at the plant in question, even if it is not identical to the coal from the affiliated supplier. If a certain characteristic of coal renders it unsuitable for use at a particular plant, it may nevertheless be suitable for purposes of price comparison, if the characteristic in question does not affect prices in the marketplace.

Staff limited its analysis of coal contracts to those for coal with heat content and sulfur content similar to that of coal now burned at the Mitchell plant because these are the two characteristics of coal that most significantly affect prices in the marketplace.[34] Ohio Power has established that coal with a high ash-fusion temperature is essential to the efficient operation of Mitchell Unit No. 2.[35] Martinka coal has such a characteristic.[36] However,

[34] Ex. 13 at 12.

[35] 25 FERC at p. 63,060, Ex. 4 at 17.

Ohio has not established that the ash-fusion temperature of Martinka coal commands a premium in the marketplace over coal with lower ash-fusion temperatures. It is therefore irrelevant for purposes of establishing comparable prices that the precise ash-fusion temperature of the coal included in staff's set of comparable contracts is unknown. We note however, that staff's evidence indicates that coal burned at neighboring plants with dry bottom boilers, such as Mitchell's, which generally require coal of higher ash-fusion temperature, does not command a price premium over coals burned at neighboring plants with wet bottom boilers.[37]

On the other hand, the captive coal may have characteristics that increase its price in the marketplace, but are not required for the boiler. The Mitchell plant was designed to burn coal with more than 4% sulfur content, and meet the emission standards of the Environmental Protection Agency.[38] Martinka coal has a sulfur content of approximately 1.5%.[39] The record in this case is clear that Ohio Power switched to Martinka coal in Mitchell Unit No. 2 because of its higher ash-fusion temperature, not because of its lower sulfur content.[40] Some of Ohio Power's witnesses suggest that the low sulfur content of Martinka coal renders it more desirable for environmental reasons than the non-affiliate coals with higher sulfur content also burned at Mitchell.[41] However,

[36] *Id.*

[37] We also note that it is clear from the record that coal with ash-fusion temperatures that met Ohio Power's bid specifications was available at prices lower than Ohio Power paid for the Martinka coal. *See* Section II.B.1.(e) of this Opinion.

[38] 25 FERC at p. 65,189, Ex. 3, at 10, Ex. 15 at 13.

[39] *See, e.g.*, 25 FERC at pp. 65,182, 65,189, Ex. 15kk at 12, Ex. 3 at 22, Ex. 15 at 6.

[40] *See, e.g.*, 25 FERC at p. 65,181, Ex. 4 at 17.

[41] *See, e.g.*, Ex. 4 at 15-21.

there is no evidence that it is required. Ohio Power's use of low sulfur coal at Mitchell appears to be fortuitous.

As described above, staff developed its benchmark price based on coals with 1-4% sulfur content from 13 plants. Of the 13 plants, eight plants used coal with a range of 1-2% sulfur content, comparable to the 1.5% sulfur content of Martinka coal.[42] If it were clear that there were no benefits from the use of low sulfur coal at the Mitchell plant, a proper sample would exclude coals with 1-2% sulfur content. It appears there are no appreciable benefits in terms of the efficiency of the boiler's operation. However, while the low sulfur coal is not required to meet environmental standards, there may be environmental benefits from its use. We find that the use of coals with 1-4% sulfur content is a reasonable compromise.

(b) Characteristics of Comparable Contracts

Ohio Power objects that the prices used by staff are derived from contracts that were executed at different times than the date of its contract with its affiliate mine. Furthermore, the contracts are for different lengths of time than the term of the contract with its affiliate. In Opinion No. 133, the Commission recognized that the long-term reliability of a contract with an affiliate, and the market conditions at the time a long-term contract is negotiated, are circumstances that might justify differences in the prices of coal that otherwise has comparable characteristics.[43] In a competitive market, prices

[42] Staff calculated a comparable market price based on the coal from the eight plants which used the 1-2% sulfur coal. As can be seen, the coal at these plants was also less costly than Martinka coal:

[Continued]

fluctuate in response to supply and demand, and to changes in the purchasing power of the dollar. Therefore, spot prices today may not be comparable to the prices derived from a 35-year contract executed 10 years ago.[44] Long-term contracts executed in a soft market, i.e., when supply is greater than demand and prices are depressed, would likely yield lower prices than contracts entered during a period of tight supply and high demand, even though the coal involved is identical in price-affecting characteristics.

Ohio Power argues that the contracts in staff's study were inappropriate in terms of contract vintage. Ohio Power asserts that, to establish a market price, the Commission should look only at contracts entered into at the same time as its Martinka contract.[45] Seventy-five percent of the contracts in staff's study were entered into after the Martinka contract.[46] The 1970s were a period of almost continuous inflation. Contracts made later in the decade, after the Martinka contract, would likely reflect higher prices. Staff therefore argues that its use of later-vintaged contracts tended to produce average prices above the level that would be truly comparable to the Martinka contract.[47]

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[42] [Continued]

	*Comparable Coal (1-2% sulfur)**	*Martinka Coal*	*Percentage Difference*
1980	141.0¢/MMBtu	184.9¢/MMBtu	31%
1981	152.9	268.7	76%
1982	176.0	206.8	18%

* Adjusted up by 3.1% from Form 423 data.

[43] 17 FERC at p. 61,246.

[44] Ohio Power's contract for Martinka coal was executed in 1972 for a term of 35 years.

[45] Ohio Power brief opposing exception at 53-54.

[46] 25 FERC at p. 65,197; Ex. 15 at 15, Ex. 15RR at 5.

[47] Staff brief on exceptions at 60 n.30.

Ohio Power's witness, Mr. Renton, testified that the coal market was "soft" from late 1971 until early 1973.[48] Supply exceeded demand and prices were low. Ohio Power's contract for Martinka coal was dated October 1, 1972, in the midst of the soft market. The Arab oil embargo and sharp increases in the world price of crude oil in 1973 apparently caused a "tight" coal market, and prices moved higher.[49] Mr. Renton characterized the market as soft from late 1974 through early 1979, followed by a tight market for a brief period in 1979 through the first part of 1980.[50] This testimony does not indicate any circumstances in the coal market when the Martinka coal contract was made that would justify unusually high prices. Nor does it indicate that prices derived from later-vintaged contracts are likely to be lower than prices reflecting the 1972 market conditions.

Staff utilized a statistical analysis technique to attempt to discern a correlation between the prices paid under its set of comparable contracts and the vintages of those contracts. Its analysis failed to show any consistent, discernible correlation.[51] The judge ultimately concluded that vintages could affect the prices, and should be looked at carefully.[52] We agree. The parties have adequately considered the possible effects of vintage on the prices derived from staff's set of comparable contracts. The only conclusion we can draw is that staff's benchmark prices may be higher, i.e., skewed in favor of Ohio Power, than if only contracts of the Martinka vintage were used for comparison.

Ohio Power presented evidence of correlations between higher prices and larger quantities of coal delivered un-

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[48] Tr. 639-41.

[49] Tr. 641.

[50] Tr. 642-43.

[51] 25 FERC at p. 65,187, Ex. 13G at 15.

[52] 25 FERC at p. 65,199.

der a contract, and between higher prices and contracts of longer duration.[53] The reliability of the data used to show these correlations and the validity of the conclusions drawn were contested by staff. The judge declined to draw any conclusions from the welter of conflicting testimony on these contentions.[54] Staff points out that Ohio Power failed to quantify what adjustments to staff's benchmark prices would be warranted if Ohio Power's alleged correlations were accepted.[55] We are likewise unable to conclude on the basis of the record evidence that the asserted correlations exist, or if so, what adjustments to the benchmark prices they would warrant.

(c) Other Measures of Comparability

(i) Mine-mouth plants

Ohio Power argued that mine-mouth plants should be excluded from the set of contracts used by staff in developing the benchmark prices because the delivered prices of coal to such plants would not include any significant transportation costs, while the delivered prices to the Mitchell plant include such costs.[56] In order to test Ohio Power's claim, staff excluded mine-mouth plants burning 1-4% sulfur coal within 50 miles of Mitchell and found that the average price was slightly lower in 1980 (-2.7¢ MMBtu or 2.3% lower), and slightly higher in 1981 (+0.1¢ or 0.1% higher) and 1982 (+3.0¢ or 2.0% higher). Staff's analysis shows that the delivered prices of coal to mine-mouth plants are not significantly different from delivered prices to the other plants in the region.[57] Therefore, we find staff's inclusion of mine-mouth plants in its set of comparable contracts acceptable.

[53] 25 FERC at p. 65,199, Ex. 9H at 9-15.

[54] 25 FERC at p. 65,199.

[55] *See, e.g.*, Staff brief on exceptions at 61-62, n.30, 73-74.

[56] Ex. 9F, *see also* Ohio Power brief opposing exceptions at 49.

[57] *See, e.g.*, Ex. 136 at 17-18, Ex. 15QQ at 3.

(ii) Transportation costs

Ohio Power questioned staff's reliance on delivered prices to plants other than Mitchell without considering the possible effects of differing costs of transportation. Ohio argued that the delivered price of some alternative coal supply might be higher (or lower), if delivered to the Mitchell plant rather than some other plant in the region, if the transportation costs are different.[58] However, the marginal differences in the costs of transporting coal to any point within a 50-mile radius are likely to be small, and there is no reason to anticipate that the average of any such differing costs to other plants would be lower than the transportation costs of shipping coal to the Mitchell plant.[59]

(iii) Geographical area

Ohio Power argues that if staff's 100-mile radius were slightly extended it would then include three more plants whose coal prices would significantly increase the averages and that "a natural break in the chain of substitution" occurs just beyond the extended radius.[60] Staff points out that two of the plants Ohio Power wants to include in the sample burn coal with less than 1.0% sulfur and would thus be outside the range of comparable coal. The coal prices at the other plant are only slightly higher than the average of those within the 100-mile radius.[61]

Drawing a line at 50 miles or 100 miles obviously involves an element of discretion. If a 100-mile radius is reasonable, it is unlikely that a 105-mile radius would be unreasonable. But once the line has been drawn, and

[58] Ohio Power brief opposing exceptions at 50.

[59] Differing transportation costs would have to be considered if benchmark prices were derived from only one or two comparable contracts.

[60] Ohio Power brief opposing exceptions at 48.

[61] Ex. 15QQ at 1-3.

there are reasonable arguments to support where it is drawn, the burden is on a challenger to demonstrate convincingly that the line should be drawn elsewhere. Ohio Power's proposal to include one more plant using coal with comparable sulfur content does not carry that burden.

We find that the presence of 13 plants within 50 miles that burn coal with price-affecting characteristics suitable for use at Mitchell provides an adequate sample of the relevant market by which to compare Martinka prices.

(iv) Price premium for affiliate supply

Ohio Power claimed that, in comparing affiliate coal prices with market prices, affiliate coal prices should be adjusted to reflect a price premium warranted by the security and reliability of an affiliate coal supply.[62] Ohio Power, however, makes no attempt at quantifying this price premium. In fact, the evidence indicates that, at least during the 1981 coal strike, the supply of Martinka coal was not as reliable as Ohio Power alleges it to be. We have considered the reliability premium argument raised by Ohio Power, but find that the company failed to meet its burden of demonstrating that such a premium is warranted.

(v) Mine type

Finally, Ohio Power argues that staff's inclusion of stripmine coal in its sample tends to produce a lower average price than if only coal from underground mines were considered. Ohio Power asserts that coal from underground mines is generally more expensive than otherwise comparable coal from strip mines.[63] However, staff's evidence shows that the strip-mine coal in its sample was more costly than the coal from underground mines.[64]

[62] Ohio Power brief opposing exceptions at 60-62.

[63] Ohio Power brief opposing exceptions at 61.

Even if Ohio Power's assertion is generally true, there is nothing in the record to justify paying a premium for coal from an underground mine if suitable coal is available at less cost from a strip mine.

(d) Average Price versus Range of Prices

Ohio Power argues that when a set of contracts are identified as comparable, the prices under these contracts should be viewed as establishing a range of reasonable prices. If prices under the affiliate contract fall within the range, they should be deemed reasonable. If they are above the highest prices in the range, refunds should be required to bring the affiliate contract prices down to the highest prices in the range, but no lower.[65] The effect of Ohio Power's approach would be to make the contract with the highest prices the benchmark, and to disregard prices under the other contracts. However, we cannot ignore the other contracts in the group unless the similarities between the affiliate contract and the contract with the highest prices are so striking, and the dissimilarities of the other contracts in the group so significant that the highest-priced contract should clearly serve as the benchmark. Ohio Power did not argue that its Martinka contract was strikingly similar to the highest priced comparable contract.

Moreover, the use of a weighted average price is a convention frequently employed to establish a reasonable midpoint.[66] It is more appropriate than relying on the highest-priced coal under any reasonably comparable contract to set the market standard and effectively ignoring all other lower prices under other reasonably comparable contracts.

[64] Ex. 15QQ at 3-5, Ex. 15RR at 6-7.

[65] Ohio Power brief opposing exceptions at 4, 13-17.

[66] *See Tennessee Gas Pipeline Co.*, 38 FERC ¶ 61,306 (1987).

(e) Ohio Power's Market Price Evidence

Ohio Power submitted evidence of its bid solicitations in 1980 and 1981 for Martinka-quality coal and the responses from independent coal suppliers.[67] Current bids are not likely to reflect the same factors affecting prices under the contract for Martinka coal, signed 10 years earlier, and original bids are likely to be higher than finally negotiated contracts. Nevertheless, we agree with the judge that evidence of current bids is relevant to discerning current market prices.

Staff notes that the average delivered price of the six lowest bidders in 1980 was roughly $1.42 MMBtu.[68] This compares to the $1.41 adjusted benchmark price that staff derived from its set of comparable transactions (for 1-2% sulfur content coal) while Ohio Power paid $1.85 MMBtu for Martinka Coal.[69] The 1981 solicitation identified seven suppliers who bid to supply low sulfur coal (comparable to Martinka), with ash-fusion temperatures and other characteristics that met Ohio Power's bid specifications, at an average delivered price of roughly $1.54 per MMBtu.[70] This compares to staff's conclusion that the comparable market price for low sulfur coal (1-2%) that year was $1.53, while Ohio Power paid $2.69 for Martinka coal.[71] Thus, Ohio Power's bid

[67] Ex. 15DD.

[68] Staff brief on exceptions at 42.

[69] *See* n.42, *supra*.

[70] Staff brief on exceptions at 43, Ex. 15LL at Sch. 6.

[71] *See* n.42, *supra*. The judge noted that the Martinka mine was closed during part of 1981 because of a strike and other operating difficulties. 25 FERC at p. 65,182. Because Ohio Power's contract obligates it to pay the Martinka mine's fixed costs regardless of the amount of production, Tr. 734, the unit cost of Matrinka coal was abnormally high in 1981. Therefore, the bid prices averaging $1.54 might be more properly compared to the $2.07 paid for Martinka coal in 1982.

evidence can be viewed as supporting staff's position on comparable market prices.

The judge said that the 1980 and 1981 bid solicitations lead to the conclusion that Martinka-quality coal could have been obtained at a cheaper price than was paid by Ohio Power.[72] However, he found this conclusion to be tempered by the fact that the market may have been soft in those years.[73] The average price of 22 offers made in 1980 ($1.58/MMBtu) compares to staff's adjusted weighted average price of $1.41/MMBtu for low-sulfur coal used within a 50-mile radius. In 1981, Ohio Power's average of 20 offers ($1.76/MMBtu) compares to staff's comparable benchmark price of $1.53/MMBtu. However, the judge's ultimate conclusion that Martinka prices "are not too bad" was based on his comparisons of the $40 per ton (converted from cents per MMBtu) average of the 1980 bids to the $44.10 per ton paid for Martinka coal and the $45 per ton average of the 1981 bids to the $48 per ton paid for Martinka coal in 1982 (substituting 1982 Martinka prices for 1981 prices to avoid the distortions caused by the strike).[74]

We think the prices from the lower bids are more indicative of market prices. Bids are indicative of market prices to the extent they are likely to be accepted and form the prices for transactions. Actual transactions are more likely to develop from among the range of lowest bids. Consequently, we believe staff's average of the lower bids is more indicative of current market prices than the average of all bids used by the judge as the basis for his conclusions.

Ohio Power also identified four coal seams owned by independent coal suppliers, within a 75-mile radius of the

[72] 25 FERC at p. 61,195.

[73] *Id.*

[74] *Id.*

Mitchell plant, that could provide Martinka-quality coal.[75] Ohio Power compared the weighted average prices of coal from this sample of mines to show that Martinka coal was $6.89 per ton more expensive in 1980, and $17.82 more expensive in 1981 (the abnormal year), but $6.08 per ton less expensive in 1982.[76]

Ohio Power's study was offered to show the reasonableness of the cost of Martinka coal but not to serve as the basis for repricing the coal.[77] However, even if it had been offered for the purpose of establishing a comparative market price, we would not find it adequate. There is substantial evidence that the relevant geographic market based on the location of mines rather than proximate coal-fired plants would approximate the geographic boundary of the Department of the Interior Bureau of Mines Districts Nos. 1-8, a much larger area than a 75-mile radius. The coal burned in other plants near Mitchell comes from those districts.[78] Ohio Power's bid solicitations went to companies with mines in those districts.[79] Ohio Power argues that coal from beyond 75 miles is usually not competitively priced because of the transportation costs. However, several suppliers from well beyond 75 miles (and within District Nos. 1-8) were among the bidders with the lowest delivered prices.[80] Ohio Power's study focused on prices of relatively small quantities of coal, and there are several other aspects of the study, as the judge noted,[81] that preclude us from according it weight as an indicator of comparable market prices.

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[75] Exhibit 4 at 33-39.

[76] Exhibit 4K.

[77] Ex. 4 at 37.

[78] Ex. 15 at 15, Ex. 15BB, Ex. 15CC.

[79] Ex. 13 at 15.

[80] Ex. 15LL at Sch. 6.

[81] 25 FERC at p. 65,203.

2. Burden of Proof

Under section 205(e) of the Federal Power Act and § 35.13(e)(3) of the Commission's regulations,[82] the utility bears the ultimate burden of proving that its rates are just and reasonable. Application of the burden of proof is described in *Minnesota Power & Light Co.*

> [U]tilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.[83]

The judge in this proceeding found that staff's evidence created a serious doubt as to whether the price paid for Martinka coal was prudent. He stated that Ohio Power "convincingly erased that doubt but did this primarily by attacking the staff's presentation rather than by an affirmative showing of prudence."[84] The judge then found that Ohio Power had satisfied "whatever legal requirement is involved in meeting its burden."[85] We disagree. Ohio Power did not dispel the doubts raised by the staff's evidence and did not prove affirmatively that its fuel costs were reasonable.

Staff has shown that Ohio Power paid in excess of the market price for the Martinka coal, and Ohio Power did not rebut this showing. Moreover, Ohio Power failed to come forward with evidence that its affiliate coal costs were reasonable in comparison to market prices. As de-

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[82] 16 U.S.C. § 824d(e) (1982); 18 C.F.R. § 35.13(e)(3) (1986).

[83] 11 FERC ¶ 61,312, at p. 61,645 (1980). *See also, Anaheim v. F.E.R.C.*, 669 F.2d 799, 809 (D.C. Cir., 1981).

[84] 25 FERC at p. 65,202.

[85] *Id.*

scribed above, all Ohio Power sought to do was cast doubt on different elements of staff's case. Ohio Power never attempted to show what the market price of coal was and therefore failed to show affirmatively that the prices it paid for the Martinka coal were reasonable. Ohio Power also failed to show that staff's evidence did not establish a market price with which to compare the cost of Martinka coal. We therefore shall reverse the judge's conclusion that Ohio Power met its burden of establishing that its costs were reasonable.

3. Conclusion

Our review of the record leads us to conclude that staff's market study, identifying plants within 50 miles of Mitchell that burn coal of comparable Btu content to that of Martinka coal and with suitable sulfur content (within a one to four percent range), provides a reliable calculation of comparable market prices by which to judge the reasonableness of Ohio Power's Martinka coal costs. The comparison [86] demonstrates that Ohio Power's costs of Martinka coal were 50% above market in 1980, 94% in 1981, and 33% in 1982. We have already considered proposed adjustments to the prices of comparable transactions to account for differences between the Martinka coal and that of comparable or suitable coal. We have considered differences in vintage, quantity, and duration of the contracts, and all other factors that the parties have suggested may justify higher prices for Martinka coal. Ohio Power has not justified disparities of the magnitude noted above.[87]

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[86] *See* chart in section II.B.1. of this Opinion.

[87] We note that Ohio Power's Martinka coal costs have continued to exceed significantly the market price derived from the plants included in staff's study. According to data from FERC Form 423, Martinka's prices have exceeded market by 24.2% to 33.4% in the years 1983 through September 1986. The comparisons are charted below:

Ohio Power suggests that there are many reasons for it to enter into affiliate coal contracts. Among these reasons are the effect of having affiliate coal mines on Ohio Power's ability to negotiate favorable coal contracts with independent coal suppliers. Ohio Power argues that the effectiveness of its coal purchases program is shown by the fact that its electric rates are low in comparison to neighboring utilities' rates. The relative level of Ohio Power's rates, however, is not evidence that its affiliate coal purchases are reasonable. There are a variety of reasons, totally unrelated to coal costs, that a neighboring utility might have differing rates. We therefore are left with a comparison of the Martinka coal prices with market price.

In view of the significance of the deviation between Ohio Power costs for Martinka coal and comparable market prices, we cannot conclude that Ohio Power's purchases of Martinka coal for its Mitchell plant are reasonable costs for its ratepayers to bear. Ohio Power has not submitted evidence which indicates otherwise. We therefore find that Ohio's rates based on those costs are not just and reasonable.

C. Establishing a Just and Reasonable Fuel Charge

Having determined that Ohio Power's rates are not just and reasonable, the Commission must establish a

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	*Comparable Coal (1-4% sulfur)**	*Martinka Coal*	*Percentage Difference*
1983	157.0¢ /MMBtu	195.1¢ MMBtu	24.3%
1984	153.4	199.5	30.1
1985	153.9	191.1	24.2
1986 **	149.1	198.9	33.4

* Adjusted by 3.1% for comparison purposes with staff's 1980-82 figures. We have no evidence that the underreporting noted in EIA's one-month audit, and on which staff relied in its calculations, continues to occur.

** Through September.

fuel charge that will result in a just and reasonable rate. This proceeding is distinguishable in this respect from the proceeding in Opinion No. 133. In that case, the Commission affirmed the judge's finding that the price of affiliate coal was reasonable under the market-price test, and it was, therefore, unnecessary for the Commission to establish an allowable price.

In this instance, the Commission believes it is reasonable to use a market price as the benchmark for Ohio Power's future fuel charges for Martinka coal and from which to calculate refunds for overcollections. For the same reasons that a market-price test is approved for determining the reasonableness of the company's proposed charges, it is appropriate to use the market-price to calculate the just and reasonable rate when the company's charges are found unreasonable, particularly in this case where the parameters for determining a comparable market price have been adequately developed in the market price analysis presented by staff.

Ohio Power posed arguments on and opposing exceptions to the initial decision regarding the adverse effects that would result if this Commission reprices its coal at a market price. For instance, Ohio Power argues that if this Commission reprices its fuel according to market price, while the SEC applies a cost-of-service requirement, it will be "whipsawed" by the two commissions.[88] Ohio Power argues that its investment in the Martinka coal mine should not be judged by focusing on a short-term comparison with prices from alternative non-affiliated suppliers. Even if its prices during the early years of the mine's production may be above the market, that relation may not continue. Ohio Power argues that the payments for Martinka coal, based on costs, may be eventually less than the comparable market prices.[89]

[88] *See, e.g.*, Ohio Power brief on exceptions at 35,62.

[89] The costs which Ohio Power seeks to recover are the equivalent of rate-based regulated costs. Prices under rate-base regulation

Ohio Power states that what may look like a "bad deal" in the short run may prove to be a "good deal" in the long run. However, Ohio Power argues if its charges to its wholesale ratepayers are limited to the market price during the early years of the contract, it will lose money on the transactions if, in the later years when market prices may exceed the cost of producing the captive coal, the SEC limits the affiliate transfer price to costs. Therefore, Ohio Power suggests that it would have no opportunity to recoup the losses it may have incurred in the early years.[90]

Ohio Power argues that the practical effect of having this Commission regulate the transaction with Ohio Power's ratepayers by one standard, while the SEC regulates the transaction with its affiliate by another standard is to limit it to recovery under the lower of the two standards.[91] Ohio argues that this amounts to a partial confiscation of its investment in Martinka, and is unfair and perhaps unconstitutional.[92] It is also detrimental to public policy, Ohio Power argues, because utilities faced with the SEC FERC "whipsaw" will forego the advantages of captive coal mines.[93]

Ohio Power's argument is misplaced. As noted above, we agree with the presiding judge's conclusion that this Commission regulates rates while the SEC regulates the intra-corporate price of coal and that section 318 of the

may be high during the early yc .rs of the inclusion of new plant in rate base. As depreciation expense is recovered, the rate base dwindles and the return on the diminished rate base likewise dwindles (if the rate of return is constant). This phenomenon is called the "front-end load effect" of rate-base pricing.

[90] Ohio Power brief on exceptions at 25, 63, 65.

[91] *See, e.g.*, Ohio Power brief on exceptions at 17, 52.

[92] Ohio Power brief on exceptions at 25, 33, 56. Ohio Power brief opposing exceptions at 70.

[93] Ohio Power brief on exceptions at 63.

Federal Power Act does not preclude the Commission from determining the just and reasonable charge for Ohio Power to recover from its wholesale customers for its purchases from the Martinka mine.[94]

The amount that the SEC allows as the transfer price of coal between Ohio Power and the Southern Ohio Coal Company does not dictate the amount that Ohio Power may recover in rates to its customers for fuel costs. This Opinion orders the company to charge ratepayers, at most, the comparable market price for Martinka coal. Although the SEC may limit the affiliate transfer price to costs even when market prices are higher than costs,[95] for electric rate purposes Ohio Power will have the option to charge its wholesale customers up to the market price for that affiliate coal. Consequently, Ohio Power is not, as it alleges, required to limit its rate recovery of Martinka coal costs to the lower of the two standards.

Allowing Ohio Power to collect the market price, even when the market price exceeds costs, is consistent with our holding in Opinion No. 133 where we stated that "the interests of the consumers will best be protected by permitting utilities that purchase coal from affiliates to recover no more from their ratepayers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier."[96] When market prices are lower than costs, tying fuel charges to the comparable market price assures that ratepayers will pay for affiliate coal no more than they would have paid for non-affiliate coal. On the other hand, when the market price exceeds costs, ratepayers will still be paying no more than what they would pay for non-affiliate coal, and will not be harmed by the affiliate relationship.

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[94] 25 FERC at p. 65,183.

[95] *But see* n.17, *supra*.

[96] 17 FERC at p. 61,246.

Establishing the comparable market price as the allowable fuel charge for affiliate coal supplies in this case will provide an incentive to Ohio Power to ensure that its subsidiary coal company is as innovative and operates as efficiently as possible.[97] The lower the affiliated company's costs, the higher Ohio Power's potential return on investment.

By allowing the collection of the comparable market price, regardless of whether the price is higher or lower than costs, Ohio Power will not be limited to collecting market price only when costs may be higher, which would preclude it from recouping high start-up costs as the costs of mining drop relative to market price. Establishing the reasonable cost of the affiliate coal supply by a comparison with the competitive market allows Ohio Power the same chance to earn a return on investment in its affiliate coal mine as an independent supplier of coal. It is Commission policy that a regulated company should not receive less revenue for its sales due solely to the mere affiliation between supplier and purchaser.[98] Whether or not Ohio Power's commitment to Martinka coal proves to be "a good deal" over the long run will depend on Ohio Power's ability to recover its investment in the mine, plus a reasonable return, without charging its ratepayers for fuel costs in excess of comparable market prices. However, this consideration is irrelevant when a comparable market price is established as a just and reasonable rate. Under the rationale of tying affiliate coal costs to the comparable market price, not only must cost recovery be limited to the market price when actual costs exceed market price, but fuel charges must be allowed up to the market price, even if actual costs are less. Therefore, if, as Ohio Power argues in this case, its investment in the Martinka coal mine will prove to be a

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[97] *Id.*

[98] *Columbia Gulf Transmission Company*, Opinion No. 47, 8 FERC 61,002 (1979), *reh'g denied*, 9 FERC 61,355 (1979).

good deal in the long run, it will benefit by recouping losses that result from the refunds of excessive fuel costs required by this Opinion and order.

D. Calculation of Coal Cost Recovery and Refund

The benchmark price mechanism approved and ordered in this Opinion will establish, for Ohio Power's Martinka coal, the market price, which will be the just and reasonable fuel adjustment charge under the Federal Power Act. The Commission will charge the benchmark price mechanism only prospectively if it can be shown that it no longer serves as a valid tool for determining comparable market prices. As ordered below, Ohio Power must calculate refunds and future fuel adjustment clause collections based on the benchmark price mechanism approved in this Opinion. The benchmark price will be based on data from FERC Form 423 and will be derived from the weighted average delivered price of contract coal to plants within 50 miles of the Mitchell plant and having a sulfur content of 1-4% and a Btu content of not less than 11,500 Btus per pound.[99]

Refunds for excessive coal costs collected through the fuel adjustment clause prior to the filed rates in this proceeding are not mandatory. Staff recommends refunds only from the dates that Ohio Power's proposed rates in this proceeding became effective subject to refund—July 29, 1982 for the Wheeling Electric Company, and December 28, 1982 for the municipals.[100]

The municipals, on the other hand, seek refunds for all of 1980, 1981 and 1982, in addition to excessive fuel costs collected since December 28, 1982. The municipals point out that we have authority to require refunds of

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[99] The Mitchell plant's boilers require coal of not less than 11,500 Btus per pound. Ex. 15 at 13, Ex. 3 at 36.

[100] The suspension order in these proceedings established these dates 20 FERC ¶ 61,081 (1982).

any costs previously collected under a fuel adjustment clause, if such costs are found to be imprudent, unjust or unreasonable, regardless of whether such costs were recovered through rates collected subject to refund.[101]

We must determine whether, and if so to what extent, refunds of historical coal costs are waranted in light of the interests of the customer and the utility.[102] For the reasons stated below, we will require refunds for Ohio Power's collections of its Martinka coal costs only after the effective date of the rate increases under these proceedings.

The Commission did not adopt the comparable market-price test for the reasonableness of affiliated coal costs until the issuance of *Public Service Company of New Mexico*, Opinion No. 133, on November 9, 1981. Prior to that date Ohio Power would not necessarily have anticipated that fuel charges within the cost-based limits imposed by the SEC might not be acceptable under this Commission's regulation. No one challenged the reasonableness of these affiliate coal costs until the instant proceeding. As such, no refunds will be ordered for excessive costs collected prior to the effective date of superseding rates in this proceeding.

The Commission orders:

(A) The initial decision is affirmed and adopted to the extent it is not inconsistent with this Opinion and order. Exceptions to the initial decision not granted in this Opinion are denied.

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[101] *Public Service Company of New Hampshire*, Opinion No. 37, 6 FERC ¶ 61,299 (1979); *Electric Cooperatives of Kansas*, 14 FERC ¶ 61,176 (1981); *Carolina Power & Light Company*, 17 FERC ¶ 61,118 (1981); and *Delmarva Power and Light Company*, 24 FERC ¶ 61,199, at p. 61,461 (1983).

[102] *Second Taxing District of the City of Norwalk v. F.E.R.C.*, 683 F.2d 477, 490 (D.C. Cir. 1982).

(B) Ohio Power shall file revised rates in accordance with this Opinion and order, and refund the difference between amounts collected subject to refund and amounts payable under the revised rates. Refunds shall be made with interest, in accordance with 18 C.F.R. § 35.19(a) (1986).

(C) Ohio Power shall file, within 30 days of the date of issuance of this Opinion and order, an amendment to its fuel adjustment clause. This amendment shall specify the method, consistent with paragraph (D), for estimating monthly fuel charges for billing purposes (unless a lagged fuel adjustment is used) and any true-up procedures to adjust for actual data as it becomes available.

(D) Ohio Power shall calculate the comparable market prices for its purchases of Martinka coal for delivery to its Mitchell plant in accordance with the following method and on the basis of data filed with the Commission on FERC Form 423, and may include up to the comparable market price of Martinka coal in calculating that portion of its monthly fuel charge related to fuel costs associated with generation from the Mitchell plant. The comparable market price shall be the weighted average delivered price of contract coal, having a sulfur content of 1-4% and a Btu content of not less than 11,500 Btus per pound, to plants within 50 miles of the Mitchell plant. To the extent Ohio Power calculates the comparable market price on the basis of estimates, for fuel clause purposes it shall adjust its fuel charges on the basis of the data filed with the Commission on FERC Form 423 within six months of calculating any comparable market price on the basis of estimates. Ohio Power must also revise its demand rates to reflect benchmark prices for Martinka coal used at its Mitchell plant in its Period II working capital estimates.

(E) Ohio Power shall make refunds in accordance with paragraph (B) and implement the procedures required by paragraphs (C) and (D) within 75 days of the

date of issuance of this Opinion and order. However, if an application for rehearing is pending at the end of the 75-day period, the refunds shall be made, and the procedures implemented, within 30 days of the date such application is disposed of by the Commission.

(F) The May 15, 1986 motion of New England Power Company to file an *amicus curiae* brief in this proceeding is denied.

(G) Subdocket 000 of Docket Nos. ER82-553 and ER82-554 are hereby terminated. New subdockets will be assigned to Ohio Power's compliance filings required by this order.

APPENDIX D

FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

Docket Nos. ER82-553-002, ER82-553-003, ER82-554-002, and ER82-554-003

OHIO POWER COMPANY

Opinion No. 272-A; Opinion and Order Denying Requests for Rehearing, and Denying Request for Stay

(Issued April 7, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Opinion No. 272 on recovery of the cost of coal purchased from an affiliate issued April 30, 1987, appears at 39 FERC P61,098.]

[Opinion No. 272-A Text]

On April 30, 1987, the Commission issued Opinion No. 272 in this proceeding.[1] The Commission affirmed the presiding administrative law judge's conclusion in the

[1] *Ohio Power Company*, Opinion No. 272, 39 FERC P61,098 (1987).

initial decision[2] that the Commission is not precluded by either statute[3] or regulation[4] from determining whether it is just and reasonable for Ohio Power Company (Ohio Power) to recover the full costs of its purchase from the Martinka mine from its wholesale rate payers, and that Ohio Power's affiliate coal costs are subject to the comparable market price test, adopted in Public Service Company of New Mexico, Opinion No. 133,[5] to determine the reasonableness of those costs. The Commission, however, reversed the initial decision by concluding that the costs Ohio Power had recovered for its purchases of Martinka coal were unreasonable when compared with the market price for comparable coal. The Commission ordered Ohio Power to refund amounts collected, as of the effective dates of the rates in these proceedings, to the extent that they reflect a price exceeding the market price for comparable coal.

Ohio Power has filed a request for rehearing. The utility argues that section 318 of the Federal Power Act and section 35.14(a)(7) of our regulations preclude the Commission from considering the reasonableness of Ohio Power's affiliate coal costs. Ohio Power also urges that the Commission's decision was not based on substantial evidence. Ohio Power believes the Commission should have analyzed its coal purchases using a prudence standard which, it contends, would have resulted in the Commission's approving the utility's affiliate coal costs. Ohio Power further contends: that the comparable market price test in this case is inconsistent with the standard

[2] *Ohio Power Company*, 25 FERC P63,060 (1983).

[3] Section 318 of the Federal Power Act, 16 U.S.C. § 825q (1982).

[4] 18 C.F.R. § 35.14(a)(7) (1987).

[5] 17 FERC P61,123 (1981), *reh'g denied*, 18 FERC P61,036 (1982), *aff'd, Public Service Company of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987).

used in Tennessee Gas Pipeline Co;[6] that the Commission should look at Ohio Power's total coal procurement and utilization program; and that the record shows that Ohio Power's rates are relatively low. Therefore, the Commission should allegedly not be concerned with the reasonableness of Ohio Power's coal costs because it is the rate and not isolated expense components that must meet the "just and reasonable" test. Ohio Power urges that the Commission should have not ordered refunds because the Commission adopted a novel interpretation of its fuel adjustment clause regulation, extending the market price test of Opinion No. 133 to a utility with above market price coal costs, and because the Commission waited more than three years to reverse the judge's decision that Martinka coal costs were not unreasonable. Ohio Power requests that if the Commission denies rehearing, our refund order should be stayed pending judicial review. Finally, Ohio Power argues that our order has the effect of revising the company's demand rates. The company alleges this is impermissible since those rates were settled earlier in this proceeding.

On June 1, 1987, the Municipal Wholesale Electric Customers of Ohio Power (Municipals) filed a request for rehearing of Opinion No. 272. The Municipals claim that the Commission should have ordered refunds for the period 1980-1982 as well as from the effective date of the rates, December 28, 1982. In addition, they request that the Commission clarify whether refunds are to be based on a market price determined with a 3.1% upward adjustment.[7]

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[6] Opinion No. 269, 38 FERC P61,306 (1987).

[7] As indicated in Opinion No. 272, the 3.1% adjustment was made to compensate for a potential error in the historical data, for purposes of determining whether Martinka coal costs have been execessive. This adjustment was made out of an abundance of caution in assessing the reasonableness of Ohio Power's coal costs. However, in ordering refunds, we directed the utility to calculate refunds using actual data from FERC Form 423 without making any adjustment. 39 FERC at p. 61,289. No further clarification is necessary.

Discussion

The requests for rehearing raise no arguments which warrant changing our decision in these proceedings. We shall, however, address several points raised in the pleadings.

Ohio Power contends that we must conduct a "prudence" analysis in order to assess the reasonableness of its Martinka coal costs. The Commission has already determined in Opinion No. 133 that, as a matter of policy, affiliate coal purchases should be judged by a market price standard, 17 FERC at p. 61,246, and our decision has been affirmed on appeal. 832 F.2d at 1212-14. The utility's argument that we must conduct a "prudence" analysis in the circumstances of this case is without merit.

Ohio Power also argues that our market price test is inconsistent with that used by the Commission in *Tennessee Gas*. In *Tennessee Gas*, we held that in determining the reasonableness of natural gas prices paid to affiliate producers by pipelines, it was appropriate to compare the weighted average price of all affiliate natural gas with prices paid to nonaffiliates by the pipeline and third parties. In this case, we have focused solely on the price paid by Ohio Power for coal from the Martinka mine. The decision in *Tennessee Gas* is inapposite to this case. As Ohio Power admits in its request for rehearing, all pipeline natural gas is fungible, whereas all coal is not. In addition, the question of whether prices paid to affiliated coal suppliers should be averaged, where more than one affiliate relationship is questioned in a particular case, is not present in this proceeding. In any event, Ohio Power has not presented any evidence in support of a determination of market price under the test used in *Tennessee Gas*, and, thus, failed, even under that stand-

ard, to dispel the doubts raised by Staff's evidence as to the reasonableness of the price paid by it for coal from the Martinka mine.

Ohio Power's argument that we erred by revising its demand rates is also misplaced. In approving an earlier settlement in this proceeding, we stated that it would become effective December 28, 1982, not subject to refund as to any issue except to the extent an adjustment is required as a result of the Commission's determination of the captive coal issue. 23 FERC P61,236 (1983). Because the value of Martinka coal as calculated under the market price test affects the amount of fuel stock and working cash included in rate base which, in turn, affects the level of Ohio Power's unit demand charge, our requirement that Ohio Power revise its demand charges is appropriate.

As to Ohio Power's request that we give prospective effect only to our decision, we have already rejected the contention that the application of a market price standard to the facts included in this case represents a change in Commission policy. Ohio Power argues that because it has continued its operation of the Martinka mine pending a final Commission decision, fairness requires that the decision be applied prospectively. The Municipals, on the other hand, request that we apply our decision to coal costs paid prior to the effective date of the rates filed in this proceeding. We carefully considered the interests of both the utility and its customers in Opinion No. 272 in determining that refunds should be ordered as of the date previously chosen, and we find no reason to alter our conclusion in light of the arguments made on rehearing.

Finally, Ohio Power requests that we stay the effect of our order pending judicial review. Section 705 of the Administrative Procedure Act [8] permits an administrative agency to stay its order if it finds that "justice so re-

[8] 5 U.S.C. § 705 (1982).

quires." The inquiry involves a balancing of the various interests involved, including an assessment of whether the party seeking a stay will suffer irreparable harm if the stay is denied. *Town of Highlands, N. C. v. Nantahala Power & Light Co.*, 41 FERC P61,288 (1987); *see also Middle South Energy, Inc.*, 32 FERC P61,207 (1985). In support of its request for stay, Ohio Power focuses on the matter of irreparable harm, alleging that if the Commission's decision is reversed, it will be difficult for the utility to recover the refunded coal costs from its customers.

We shall deny the request for a stay. In the event an appellate court reverses our decision, the Commission would be empowered to order Ohio Power to be made whole. The possibility that the utility might experience difficulty in recouping refunds from its wholesale customers does not constitute irreparable injury. *Nantahala Power & Light Co.*, 21 FERC P61,274 (1982).[9] Further, the utility has not shown that the customers will suffer little, if any, harm by delaying the payments of refunds. We believe that the public interest supports the rapid disbursement of refunds.

The Commission orders:

(A) The requests for rehearing of Opinion No. 272 filed by Ohio Power and the Municipals are hereby denied.

(B) The alternative request by Ohio Power for a stay of the Commission's order issued in Opinion No. 272 is hereby denied.

(C) Subdockets -002 and -003 of Docket Nos. ER82-553 and ER82-554 are hereby terminated.

[9] *See also Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).